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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, PETITIONER,

vs.

DEAN RUSK, INDIVIDUALLY AND AS SECRETARY OF STATE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED AUGUST 13, 1963

JURISDICTION NOTED OCTOBER 28, 1963

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[fol. 1]

[File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

Civil Action, No. 324-60

ANGELIKA L. SCHNEIDER, Badenbergerstrasse 20, Koeln-Ehrenfeld, Germany, Plaintiff,

v.

CHRISTIAN A. HERTER, individually and as Secretary of State.

COMPLAINT FOR INJUNCTION, DECLARATORY JUDGMENT, AND OTHER RELIEF—Filed February 1, 1960

Plaintiff by her attorneys, complaining of defendant, alleges that:

1. Plaintiff is a naturalized citizen of the United States and is a resident of West Germany, residing with her husband in a suburb of Cologne, Germany. Her address there is Badenbergerstrasse 20, Koeln-Ehrenfeld, Germany.

2. The defendant, Christian A. Herter, is an individual doing business and residing in the District of Columbia with offices at 21st Street and Virginia Avenue, N.W., Washington, D.C., and is Secretary of State of the United States. Said defendant is sued individually and as Secretary of State.

3. Jurisdiction of this Court arises under Sections 11-305 and 11-306 of the District of Columbia Code, under 28 U.S.C. Sections 2201, 2202 and 2282 and under 5 U.S.C. Section 1009. Jurisdiction is also based on the Fifth and Eighth Amendments to the Constitution of the United States.

[fol. 2] 4. Plaintiff was born on May 28, 1934 in Rimsting-am-Chiemsee, in Bavaria, in what is now the Federal Republic of Germany. She was at birth a national of Germany. She arrived in this country together with her family in April 1939, being then not quite five years of age.

5. Plaintiff became a citizen of the United States on December 4, 1950 and in 1951 a certificate of derivative citizenship was issued to plaintiff (Certificate No. A-218517), declaring that she had become a citizen of the United States on December 4, 1950.

6. Plaintiff lived in the United States continuously from 1939 to 1954. She attended grade school in Croton-on-the-Hudson, New York and high school in both Cornwall-on-Hudson, New York and Flushing, Queens, New York, graduating in June 1950. Thereafter she attended Smith College, Northampton, Massachusetts, graduating in June 1954, with the degree of Bachelor of Arts. From 1954 to 1955 she studied at the University of Bern, Switzerland on a scholarship given by the Institute for International Relations in New York, and from 1955 to April 1956 she was a full-time student at the Sorbonne in Paris. In April 1956 she returned to the United States residing in Nutley, New Jersey and took employment in New York City.

7. On June 6, 1956 the plaintiff left the United States arriving in Germany on June 12, 1956 for the purpose of marrying Dr. Dieter Schneider, a German citizen and an attorney-at-law practicing in Cologne. The marriage took place in Cologne on July 4, 1956. Plaintiff has since lived continuously in West Germany with her husband except for one six-week trip for a family visit to the United States.

[fol. 3] 8. In Germany there were born to plaintiff and her husband two sons, one on June 21, 1957, and the other on November 6, 1958. Both of these sons were, at the time of birth, and are now, citizens of the United States duly registered as such with the United States Consulate.

9. Plaintiff at all times at least from 1954 to June 1959 was in possession of a valid United States passport. This passport was amended after their births to include her two sons.

10. On or about August 21, 1959, the United States Consulate in Dusseldorf, which had possession of the United States passport issued to plaintiff and her two sons in connection with a request for extension of expiration date, deleted from it her name and crossed out her picture. The passport was returned to her as valid only in the names of her two infant sons aged respectively two and one years of age, but not for the plaintiff, their mother.

11. In September 1959, the plaintiff was requested by the American Consulate in Dusseldorf to surrender to that Consulate her Naturalization Certificate. She complied with this request under protest, the Naturalization Certificate being returned with a letter by her attorney specifically denying the Consulate's contention that she had forfeited her United States citizenship.

12. By letter dated November 25, 1959 from the United States Consulate General at Dusseldorf, plaintiff was notified that the Department of State on September 25, 1959 had decided that she had lost her American citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952 and she was served with a "Certificate of the Loss of the Nationality of the United States".

13. The actions of the United States Consulate described in paragraphs 10, 11 and 12 above were all taken pursuant to the authority of the defendant, Christian A. Herter, and he has authorized, ratified, and ordered such actions.

[fol. 4] 14. The defendant, Christian A. Herter, is illegally denying the plaintiff her rights and privileges as a citizen of the United States. He has revoked her United States passport, taken away her Certificate of Naturalization, and issued to her a Certificate of the Loss of the Nationality of the United States, all in violation of the Constitution of the United States.

15. The illegal actions of the defendant heretofore described have caused and are causing the plaintiff to suffer irreparable injury. Said actions have prevented the plaintiff from enjoying diplomatic protection by the United States, from traveling under a United States passport, and

have denied plaintiff other privileges of American citizenship. Further, under German law, when the plaintiff's United States passport expired and was not renewed, she was and is as a stateless person in danger of being required to leave Germany and her husband. Plaintiff now has a temporary identification paper from the local authorities as a stateless person permitting her to remain in Germany for a limited time and with no assurance of extension.

16. The actions of defendant complained of herein purport to be based solely upon the authority of Section 352(a)(1) of the Immigration and Nationality Act of 1952. Such actions and the statute pursuant to which they purport to have been taken, are illegal and a deprivation of liberty and property without due process of the law, in violation of the Fifth Amendment of the Constitution of the United States because (1) they purport to expatriate a naturalized American citizen against her will solely because of three years' residence in the country of her origin, and [fol. 5] (2) because they discriminate between native born and naturalized citizens. Such purported deprivation of citizenship also constitutes cruel and unusual punishment in contravention of the Eighth Amendment to the Constitution.

17. Unless this Court grants the relief requested there exists no other adequate remedy for the irreparable injury to which plaintiff is being subjected.

Wherefore, plaintiff prays that:

(1) the Court issue a temporary restraining order, a preliminary injunction and a permanent injunction enjoining the defendant, his successors and subordinates, from carrying out or enforcing the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 or from denying the plaintiff any of the rights and privileges of a citizen of the United States or from withholding from the plaintiff a United States passport on the ground that she is not a citizen of the United States;

(2) that the Court order the defendant to expunge from the records of the Department of State its ruling that the

plaintiff is no longer a national of the United States, and to revoke and nullify the Certificate of the Loss of the Nationality of the United States, heretofore issued to the plaintiff;

(3) that the Court order defendant to return to plaintiff her Certificate of Naturalization;

(4) that the Court order defendant to issue to the plaintiff a United States passport;

[fol. 6] (5) that the Court render a declaratory judgment that the plaintiff is a citizen of the United States and is entitled to all of the rights and privileges of a citizen of the United States;

(6) that the Court grant such further relief as may be just, lawful and equitable in the premises.

Milton V. Freeman, Charles A. Reich, 1229—19th Street, N.W., Washington 6, D.C.

Horst Kurnik, 27 William Street, New York 5, New York.

Of counsel: Arnold, Fortas & Porter, 1229—19th Street, N.W., Washington 6, D.C.

Date: February 1, 1960.

[fol. 7] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed April 2, 1960

Plaintiff Angelika L. Schneider, upon the pleadings herein and upon the attached affidavit of the plaintiff, moves the Court to grant summary judgment for the plaintiff, ordering, adjudging and decreeing as follows:

(1) that the defendant, his successors and subordinates be enjoined from carrying out or enforcing the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 or from denying the plaintiff any of the rights and privileges of a citizen of the United States or from withholding from the plaintiff a United States passport on the ground that she is not a citizen of the United States;

(2) that the defendant expunge from the records of the Department of State its ruling that the plaintiff is no longer a national of the United States, and revoke and nullify the Certificate of the Loss of the Nationality of the United States, heretofore issued to the plaintiff;

(3) that the defendant return to plaintiff her Certificate of Naturalization;

(4) that the defendant issue to the plaintiff a United States passport;

[fol. 8] (5) that the plaintiff is declared to be a citizen of the United States and is entitled to all of the rights and privileges of a citizen of the United States.

This motion is made pursuant to Rule 56 (F.R.C.P) on the ground that there is no genuine issue as to any ma-

terial fact and that the plaintiff is entitled to judgment as a matter of law.

Respectfully submitted,

Milton V. Freeman, Charles A. Reich, 1229 19th Street, N.W., Washington 6, D. C.

Horst Kurnik, 27 William Street, New York 5, N. Y., Attorneys for Plaintiff.

Of counsel: Arnold, Fortas & Porter, 1229 19th Street, N.W., Washington, D. C.

Date: April 2, 1960.

[fol. 9] [File endorsement omitted]

[Title omitted]

AFFIDAVIT OF PLAINTIFF ANGELIKA L. SCHNEIDER IN SUPPORT OF MOTION

I, Angelika L. Schneider, being duly sworn, depose and say:

1. That I am the plaintiff in the above-entitled action.

2. That I am 25 years of age, a married woman living with my husband and two infant sons in a suburb of Cologne, Germany.

3. My husband is Dieter Schneider, a lawyer practicing in Cologne, Germany. He is a partner in the firm of Boden, Klonz, Oppenhoff, Andreae, Mathy and Schneider of Cologne.

4. I feel myself an American and I value my American citizenship highly. Practically all my relatives, except my husband and children, live in the United States and are American citizens. These include two brothers, a half brother and sister.

5. I regard the United States as my country. I have had all my schooling (grade school, high school and college) in

the United States except for some post-graduate work in Switzerland and France.

6. I am advised by the Department of State that I am no longer an American citizen and am not entitled to passport and nationality privileges as an American because I am married to a German citizen and living with him and our [fol. 10] children in Germany where he resides and works. I am told that I have lost my citizenship because the country in which I live and in which my husband lives and works happens to be the one where I was born. I am also told that if I had married a resident of any other country and gone to live with him and raise children in the country where he lived and worked, I would not lose my American citizenship. Moreover, if I had been born rather than naturalized an American citizen I would also be able to conduct a normal family life with my husband in Germany. Instead, as a result of the action of the State Department in taking away my passport and my naturalization certificate, I am faced with a choice of giving up my husand and family life with him, or of being forced to give up my country. I do not wish to accept either alternative. I wish to be an American citizen which I feel myself to be and also to remain with my husband and our children in Germany where he practices his profession.

7. I have been able to acquire from the local authorities in Germany an identification paper as a stateless person which expires in February 1961 and a temporary residence permit which may be withdrawn at any time. I hope that this arrangement can be extended until a decision of this case is reached, but I have no assurance that any extension can be given. The action in question places me in a position where I have no nationality. In addition, even if I could get an extension of my temporary permit and stateless persons identification paper, I am forbidden by that identification paper to travel as an American. Further, I cannot go with my husband who is required to travel to various countries in Europe and to the United States, without obtaining first special visas which, as a stateless person, are very difficult to obtain; whereas as an American citizen I would not even need a visa in most countries, the passport being sufficient.

But, more important, wherever I may be I can call on no government as my own to protect me.

[fol. 11] 8. I regard myself as an American. I have spent my entire childhood and youth in the United States and regard it as my country. From the time I was five until I came to Germany in 1956 to be married, I had been in Germany only briefly in 1954 and 1955 travelling through and have neither felt nor had any connection with that country. I have no political loyalty or allegiance to either Germany or any other country except the United States.

9. I was born in Rimsting-am-Chiemsee, Bavaria, in what is now Western Germany, on May 28, 1934. Before I was 5 years of age I was brought to the United States by my mother and father and lived there with them and my two brothers and my mother's two children by a previous marriage. We lived in Croton-on-Hudson and Cornwall-on-Hudson, New York, and I went to grammar school in Croton and attended high school in Cornwall and Flushing, New York. I graduated from Flushing High School in 1950.

10. I was naturalized derivatively on December 4, 1950 through the naturalization of my mother, and in 1951, was given a Certificate of Naturalization (Certificate No. A-218517), which certified to this fact. I do not have this certificate since I was required to surrender it to the State Department as I shall explain below.

11. In the fall of 1950 I entered Smith College, in Northampton, Massachusetts, and graduated in 1954. On graduation from Smith I accepted a scholarship at Bern University, Switzerland given to me by the Institute of International Education of New York City. I studied there for two semesters from the winter of 1954 through the summer of 1955. In the fall of 1955 I went to Paris and enrolled at the Sorbonne as a full-time student for the winter term 1955-1956.

12. When I was preparing to leave for Switzerland in the fall of 1954 my uncle, Horst Kurnik, Esquire (my mother's brother) gave a farewell party for me at his home in Nutley, New Jersey. Shortly before that, my uncle had

met a young German lawyer, Dr. Dieter Schneider, who had come to New York on a Fulbright Research Scholarship [fol. 12] and was working as a visiting trainee with an international trademark and patent firm in New York (Langner, Parry, Card & Langner) and studying at New York University Law School. My uncle invited him to the farewell party and this was where I first met my future husband.

13. I next saw him about a year later while passing through Cologne. Thereafter, while I was studying in Paris, in about February 1956, we became engaged. I went back to the United States in April. I lived in Nutley, New Jersey and took a job in New York City. I worked there until my fiancé and I decided on a date for our marriage. I then left the United States in June 1956 for Germany. I arrived there June 12 and we were married in Cologne on July 4, 1956.

14. Except for a six-week trip to the United States in September and October 1957 to show my first-born to my relatives, I have not been back to the United States since 1956. I intend to live with my husband and to go with him wherever he may be. Since his law practice is in Cologne, it appears likely that he and I will remain there for the indefinite future, although I would hope to be able to go to the United States frequently.

15. We now have two sons, one Dieter Laurens, born June 21, 1957, and the other Marc Robert, born November 6, 1958. They were both registered, upon birth, at the United States Consulate in Dusseldorf.

16. I have been in possession of an American passport since September 7, 1954 and my sons were included in my last passport, both with their photographs and descriptions. When I applied in August 1958, at the expiration of my most recent passport, for a new passport I was not granted the normal two-year passport. Instead, the American Consulate in Dusseldorf issued me a passport limited until June 10, 1959, which was approximately the expiration date of a three-year period beginning with the date of my arrival in Germany for the purpose of marrying Dr. Schneider.

[fol. 13] 17. When, on June 9, 1959, I went to the United States Consulate in Dusseldorf and requested an extension, the extension was refused to me. It was later granted as to my children. This action was taken by crossing out my picture and my name in the passport, but leaving the pictures and the names of my children and granting them an extension of the passport. Under this passport, my infant sons may travel as American citizens but I am not able to accompany them as such.

18. As I understand it, under German law I was entitled to reside in Germany with my husband so long as I had a valid passport from any other country. When I lost my United States passport by the refusal of the American Consul to extend it, the local police asserted that German law required my expulsion and it was only after much discussion and difficulty that I was granted permission to stay for an interim period and issued an identification paper.

19. In September 1959 I was requested by the American Consulate in Dusseldorf to surrender to them the Naturalization Certificate which had been issued to me in 1951 certifying that I was naturalized in the United States as of December 4, 1950. The Naturalization Certificate was in the possession of my uncle, Horst Kurnik, Esquire, attorney at law, at 27 William Street, New York 5, New York, who, at my instruction, surrendered the Certificate under protest. A copy of his letter of September 22, 1959 to the United States Consulate General in Dusseldorf enclosing the Naturalization Certificate is attached as Exhibit A.

20. In August 1959, the American Vice Consul at Dusseldorf had prepared a Certificate of Loss of Nationality in my case, and sent it to the State Department for approval. This approval was given by the State Department on September 25, 1959. By letter of November 25, 1959 a copy of this certificate was sent to me. I am attaching hereto as Exhibit B to this affidavit a copy of the letter of the American Consulate General dated November 25, 1959 and the enclosed Certificate of Loss of Nationality.

[fol. 14] 21. The letter of the American Consulate indicated that an appeal lay to the Board of Review on the Loss

of Nationality in the State Department in Washington. Such an appeal was duly taken and by letter dated January 20, 1960, my counsel was advised that the Board had "affirmed the previous administrative decision" that I had "expatriated" myself. I am told that this action of the Board is the "final administrative determination" of the State Department and that I have no recourse except to this Court.

22. I understand that the statutes involved apparently require the results reached by the State Department. I cannot believe, however, that the Constitution of the United States permits me to be faced with the cruel choice of surrendering either my family or my country. I have, accordingly, directed the institution of the necessary proceedings to establish what I believe to be the true and just conclusion that I, although naturalized, have the same freedom as any American girl who received her citizenship by birth to marry where I please and to live with my husband and family without giving up my American citizenship.

Angelika L. Schneider.

Germany
City of Dusseldorf
Consulate General of the
United States of America, ss.:

Subscribed and sworn to before me, Keith M. Heim, Vice Consul of the United States of America at Dusseldorf, Germany, this 15th day of March, 1960.

Keith M. Heim, American Vice Consul, duly commissioned and qualified.

Service No. 0867
Tariff Item No. 45
Fee Paid US $-(2.50)
Local Cy DM 10.50 Paid

[fol. 15]

EXHIBIT "A" TO AFFIDAVIT

Registered Mail September 22, 1959

U. S. Consulate General
Cecilienallee
Duesseldorf
West Germany

Re: Angelika L. Schneider,
nee Schaeffer

Gentlemen:

At the request of my above client, I am enclosing herewith her original Naturalization Certificate, No. A-218517.

At the same time, I wish to point out to you that this surrender of her citizenship certificate to you shall not be construed as yielding to your Department's contention that she has forfeited her United States citizenship. It is, on the contrary, her contention that the facts underlying her residence in Germany fall within the exemption provisions of the Immigration and Naturalization Act (Public Law 414), respectively that so much of that law as differentiates between the natural born and naturalized citizen violates the Constitution of the United States.

Respectfully,

Horst Kurnik

HK/f
enclosure

[fol. 16]

EXHIBIT "B" TO AFFIDAVIT

(Emblem)

221—SCHNEIDER, Angelica Liasse
TKO:gw

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

American Consulate General,
Duesseldorf, Germany,
5, Cecilien Allee,
November 25, 1959

Dear Mrs. Schneider:

Reference is made to the Certificate of the Loss of the Nationality of the United States submitted in your case by this Consulate General to the Department of State, Washington, D.C.

The Department of State has confirmed your loss of American nationality under Section 352 (a)(1) of the Immigration and Nationality Act of 1952 for *having a continuous residence for three years in the territory of a foreign state of which she was formerly a national, i.e., in Germany, since June 12, 1956.*

A copy of the certificate is enclosed for your retention.

You are hereby notified that you have the privilege of appealing to the Board of Review of the Passport Office, Department of State, Washington, D.C., with regard to the decision that you have lost your American nationality. You should understand that the Board of Review must consider the case on the basis of the evidence which has previously been submitted or may subsequently be submitted and will be compelled to hold that you have lost your American nationality if such evidence brings your case within the law. If you think that the law has not been properly applied, or that any portion of the evidence has not been given sufficient weight, or if you wish to submit new or additional evidence, you may present the appeal. The appeal may be made through a for-

eign service office or through a relative, friend or attorney in the United States. No formal application for reconsideration need be made but a statement should be submitted preferably under oath giving the grounds of appeal and should be supported by such documentary evidence as may be available.

Very truly yours,

For the Consul General:

/s/ THEODORE K. OSGOOD
Theodore K. Osgood
American Vice Consul

Registered
Encl.: Cert. of Loss.

Mrs. Angelica Liasse Schneider,
20 Baadenbergerstr.,
Koeln-Ehrenfeld.

Italicized matter underscored in original.

[fol. 17]

FOREIGN SERVICE OF THE UNITED STATES OF AMERICA

CERTIFICATE OF THE LOSS OF THE NATIONALITY OF THE UNITED STATES

(This form has been prescribed by the Secretary of State pursuant to Section 501 of the Act of October 14, 1940, 54 Stat. 1171 and Section 358 of the Act of June 27, 1952, 66 Stat. 272)

Consulate General of the United States of America at Duesseldorf, Germany } ss.:

I, Leon PURACH, hereby certify that, to the best of my knowledge and belief, Angelica Liasse SCHNEIDER nee Schaeffer was born at Rimsting, Germany, on May 28, 1934;
(Town or city) (State or country) (Date)

That she resides at 20 Baadenbergerstrasse, Koeln-
(Street) (City)
Ehrenfeld, Germany;
(State)

That she last resided in the United States at 309 Grant
(Street)
Avenue, Nutley 10, New Jersey;
(City) (State)

That she left the United States on June 6, 1956;
(Precise date should be given)

The she acquired the nationality of the United States by virtue of naturalization before the U.S. District Court.
If a national by birth in the United States, so state; if naturalized, give the name and place of the court in the United States before which naturalization was granted and the date of such naturalization)
in New York City, on December 4, 1950

That she has expatriated herself on June 12, 1959 under the provisions of Section 352 (a)(1) Chapter 3 of Title III of the Immigration and Nationality Act of 1952[1] by having a continuous residence for three years in the ter-
(The action causing expatriation should be set forth succinctly)
ritory of a foreign state of which she was formerly a national, i.e., in Germany, since June 12, 1956.

That the evidence of such action consists of the following: Mrs. Schneider's statement that she arrived in Ger-
(Here list the sources of information and such documentary evidence as may be available concerning the action causing expatriation of the individual concerned)
many on June 12, 1956, and her presence at this office on August 14, 1959.
(Month)

In testimony whereof, I have hereunto subscribed my name and affixed my office seal this 26th day of August, 1959.

[SEAL]

/s/ LEON PUKACH
(Signature)
Leon Pukach
Vice Consul
(Title of officer)

Approved by the Department of State on September 25, 1959.

[fol. 18] [File endorsement omitted]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER—Filed July 29, 1960

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, defendant avers as follows:

1. Defendant admits the allegations contained in paragraph 1 of the complaint, except insofar as he denies that plaintiff is now a naturalized citizen of the United States.

2. Defendant admits the allegations contained in paragraph 2 of the complaint.

3. Defendant denies the allegations contained in paragraph 3 of the complaint.

4 and 5. Answering the allegations contained in paragraphs 4 and 5 of the complaint, defendant admits the following: Plaintiff, as Angelica Liasse Shaeffer, was born of German parents on May 28, 1934 at Rimsting, Bavaria, Germany, in what is now a part of the Federal Republic of Germany. Plaintiff came to the United States in 1940 and resided here until September 1954. Her mother was naturalized as a citizen of the United States in 1946 and her father was naturalized as a citizen of the United States on December 4, 1950, at which time plaintiff also acquired the status of a naturalized citizen of the United States under the provisions of Section 314(a) of the Nationality Act of 1940. In 1951 a certificate of derivative citizenship (Certificate No. A-218517) was issued to

plaintiff, declaring that she had become a citizen of the United States on December 4, 1950.

6. Defendant admits the allegations contained in paragraph 6 of the complaint.

[fol. 19] 7. Answering the allegations contained in paragraph 7 of the complaint (as corrected and amended by the stipulation entered into and submitted to this Court by counsel for the respective parties on or about February 10, 1960), defendant admits as follows: Plaintiff, on June 6, 1956, left the United States and arrived in the Federal Republic of Germany on June 12, 1956, for the purpose of marrying Dr. Dieter Schneider, a German citizen and an attorney-at-law practicing in Cologne, Federal Republic of Germany. Plaintiff married her present husband, the said Dr. Schneider, in Cologne on July 4, 1956. Plaintiff has resided continuously in the Federal Republic of Germany since June 12, 1956 and has not returned to the United States during such period, except for one trip to the United States of about six weeks duration for the purpose of visiting her family. It is averred that plaintiff intends to continue residing in the Federal Republic of Germany with her husband and children so long as her husband remains there and that she has no definite intention to return to the United States to reside.

8. Answering the allegations contained in paragraph 8 of the complaint, defendant admits as follows: In the Federal Republic of Germany there was born to plaintiff and her husband two sons, one on June 21, 1957, and the other on November 6, 1958. Both children acquired United States citizenship at birth under the provisions of Section 301(a)(7) of the Immigration and Nationality Act of 1952, and have been duly registered as United States citizens with a United States Consulate in the Federal Republic of Germany. It is averred that the two children, notwithstanding their United States citizenship, have also acquired German nationality by reason of their birth through the said German citizen father.

9. Answering the allegations contained in paragraph 9 of the complaint, defendant admits as follows: Plaintiff, as Angelica L. Shaeffer, was issued on September 7, 1954 United States Passport No. 468672. She was registered as a national of the United States residing abroad on October 26, 1954, by the United States Consulate at Bern, Switzerland. On June 21, 1956, Passport No. 468672 was renewed by the United States Consulate at Dusseldorf, Germany. On August 20, 1957, the passport was amended by the United States Consulate at Dusseldorf, Germany, to read in her married name, Angelica Schneider, and to include [fol. 20] the sole child then born to her. On August 28, 1958, plaintiff was issued a new United States Passport, No. 296, which was valid only to June 11, 1959. On June 10, 1959, plaintiff executed an application for the extension of her registration and Passport No. 296 to August 28, 1960. Such application was referred by the United States Consulate at Dusseldorf, Germany, to the Department of State for consideration and decision. The requested extension was denied by the Department of State on the basis that she was considered to have expatriated herself under the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 unless she could establish that her case came within one of the exemptions provided in Section 353 of that Act. Thereafter, plaintiff, together with one of her present counsel, visited the United States Consulate at Dusseldorf, Germany, on August 14, 1958, for the purpose of clarifying her citizenship status. At that time, plaintiff and her counsel did not contest the fact that she had lost her citizenship under the provisions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 or that she was unable to establish that her case came within one of the exemptions specified in Section 353 of that Act. The birth of the second of the two aforesaid children was reported on that occasion to the said Consulate.

10. Answering the allegations contained in paragraph 10 of the complaint, defendant admits as follows: On or shortly prior to August 21, 1959, the United States Consulate in Dusseldorf, which had possession of the United States passport issued to plaintiff in connection with the aforesaid request for extension of the expiration date,

deleted from such passport her name and crossed out her picture but did not do so with respect to the name or picture of her first born child. The passport, which was amended to exclude her but to include both of her two said children, was returned to her as valid only in the names of such children.

11. Answering the allegations contained in paragraph 11 of the complaint, defendant admits as follows: On August 26, 1959, a United States Consular Officer at Dusseldorf certified that plaintiff expatriated herself under the pro- [fol. 21] visions of Section 352(a)(1) of the Immigration and Nationality Act of 1952 by having a continuous residence for three years in the territory of a foreign state of which she was formerly a national, i.e., in Germany, since June 12, 1956. Such certification was approved by the Department of State on September 25, 1959. Plaintiff in September 1959 was requested by the United States Consulate in Dusseldorf to surrender to that Consulate her Naturalization Certificate. Plaintiff complied with this request under protest, the Naturalization Certificate being returned with a letter by her attorney specifically denying the Consulate's contention that she had forfeited her United States citizenship.

12. Answering the allegations contained in paragraph 12 of the complaint, defendant admits as follows: The United States Consulate at Dusseldorf was advised of the aforesaid approval by the Department of State of the above-described certification by the Consulate respecting plaintiff's expatriation under Section 352(a)(1) of the Immigration and Nationality Act of 1952. Thereafter, by letter dated November 25, 1959 from the United States Consulate General at Dusseldorf, plaintiff was notified that the Department of State on September 25, 1959, had decided that she had lost her United States citizenship pursuant to Section 352(a)(1) of the foregoing Act, and she was served with a "Certificate of the Loss of the Nationality of the United States".

13. Defendant admits that the actions described in the allegations contained in paragraphs 10, 11 and 12 of the Complaint to the extent they have been admitted in this answer were all taken pursuant to the authority of defen-

dant, and he has authorized, ratified, and ordered such actions. Further answering, defendant avers as follows: By letter dated January 5, 1960, plaintiff through counsel appealed to the Board of Review On The Loss of Nationality, Passport Office of the Department of State, from the aforesaid decision of the said Department that she had expatriated herself on June 12, 1959 under Section 352 (a)(1) of the Immigration and Nationality Act of 1952. Upon review and consideration, the said Board of Review On The Loss of Nationality affirmed such previous decision and, on January 20, 1960, advised plaintiff through her [fol. 22] counsel in writing to this effect. It is further averred that plaintiff's first name, while spelled as "Angelika" in the complaint, is shown as "Angelica" in official records of the Department of State, including certain documents signed by her.

14. Defendant denies the allegations contained in paragraph 14 of the complaint, except insofar as he admits that he has caused plaintiff's United States passport to be revoked, her Certificate of Naturalization to be taken away from her, and a Certificate of the Loss of the Nationality of the United States to be issued to her.

15. Answering the allegations contained in paragraph 15 of the complaint, defendant avers as follows: The allegations contained in the first and second sentences of such paragraph are dened, except insofar as it is admitted that plaintiff no longer is entitled to the diplomatic protection of the United States, to travel under a United States passport, and to enjoy certain other privileges of United States citizenship. Further answering, defendant is not required to answer the allegations contained in the third and fourth sentences of the said paragraph of the complaint since they are irrelevant and immaterial but, if an answer be required, defendant avers that he is without knowledge or information sufficient to form a belief as to the truth of such allegations.

16. Answering the allegations contained in paragraph 16 of the complaint, defendant avers as follows: As respects the allegations contained in the first sentence of

such paragraph, it is admitted that the actions of defendant complained of in the complaint are based solely upon the authority specified in Section 352(a)(1) of the Immigration and Nationality Act of 1952. Further answering, defendant is not required to answer the remaining allegations of such paragraph as they are conclusions of law but, if an answer be required, they are denied.

17. Defendant denies the allegations contained in paragraph 17 of the complaint. The remaining allegations of the complaint are denied.

[fol. 23] Third Defense

The complaint should be dismissed for the reason that the Court lacks jurisdiction over the person of the plaintiff.

Fourth Defense

The complaint should be dismissed for the reason that the Court lacks jurisdiction over the subject matter.

Fifth Defense

The complaint should be dismissed for the reason that plaintiff has failed to exhaust her administrative remedies under Section 360 of the Immigration and Nationality Act of 1952.

Sixth Defense

Even assuming arguendo that the administrative remedies available to plaintiff under Section 360 of the Immigration and Nationality Act of 1952 are not exclusive, they are the specified remedies which in the circumstances of the instant case must first be exhausted by plaintiff before the Court may obtain jurisdiction over the person of the plaintiff and the subject matter. The complaint fails to reflect any basis upon which plaintiff's failure to exhaust the specified remedies provided by Section 360 of the Immigration and Nationality Act of 1952 may be excused. Hence, the complaint should be dismissed by reason of plaintiff's failure to exhaust such remedies.

Seventh Defense

The complaint fails to raise a substantial constitutional question.

Oliver Gasch, United States Attorney;

Edward P. Troxell, Principal Assistant United States Attorney;

John F. Doyle, Assistant United States Attorney;

Harold D. Rhynedance, Jr., Assistant United States Attorney.

[fol. 24] Certificate of Service (omitted in printing).

[fol. 25] [File endorsement omitted]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AFFIDAVIT OF HORST KURNIK IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed August 9, 1960

State of New York,
County of New York, ss.:

Horst Kurnik being duly sworn deposes and says:

1) I am one of the attorneys for plaintiff in the above entitled action.

2) I am making this affidavit with reference to some of the allegations set forth in 9th of defendant's Answer served on July 29, 1960.

3) In that Nr. 9. of his Answer defendant alleges as follows:

"Thereafter, plaintiff, together with one of her present counsel, visited the United States Consulate at Duesseldorf, Germany, on August 14, 1958, for the purpose of clarifying her citizenship status. At that time, plaintiff and her counsel did not contest the fact that she had lost her citizenship under the provision of Sec. 352 (a) (1) of the Immigration and Nationality Act of 1952 or that she was unable to establish that her case came within one of the exemptions specified in Sec. 353 of that act."

4) My records reveal that I visited together with the plaintiff the United States Consulate at Duesseldorf on August 14, 1959 (and not 1958 as alleged in the Answer). [fol. 26] At that time plaintiff had come to the office at the request of the U.S. Consul.

5) When we appeared before the consul the official in charge indicated that her passport had to be cancelled. He also urged plaintiff to sign a statement setting forth all the facts which he did not explain to me or her.

6) My immediate reply was that I was advising plaintiff not to sign any written statements or to make any oral statements whatsoever and thereupon plaintiff refused to make any statements.

7) At the same time I protested the forfeiture of plaintiff's citizenship as being illegal under the Immigration and Nationality Act of 1952 and the U.S. Constitution and I indicated that in the event her passport would be cancelled and her citizenship would be considered forfeited appropriate actions would be inaugurated in order to contest such action by Defendant or his agents.

8) Subsequently plaintiff was requested by the U.S. Consul in Duesseldorf to surrender her Naturalization Certificate. This was done by me under protest as is specifically admitted in the last sentence of paragraph 11 of the Answer filed by defendant herein. My letter of protest is attached to plaintiff's affidavit already filed in support of this motion.

9) Accordingly the allegation that "Plaintiff and her [fol. 27] counsel did not contest the fact that she had lost her citizenship" is not in accordance with the facts.

Horst Kurnik

Sworn to before me this 5th day of August 1960.

Joseph W. Landes, Notary Public, State of New York, No. 31-2243200, Qualified in New York County, Commission Expires March 30, 1961.

[fol. 28] Certificate of Service (omitted in printing).

[fol. 29] [File endorsement omitted]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS—Filed August 11, 1960

Comes now defendant by his attorney, the United States Attorney, and moves for judgment on the pleadings for the reason that on the pleadings defendant is entitled to judgment as a matter of law.

Oliver Gasch, United States Attorney;

Edward P. Troxell, Principal Assistant United States Attorney;

John F. Doyle, Assistant United States Attorney;

Harold D. Rhynedance, Jr., Assistant United States Attorney.

[fol. 30]

[File endorsement omitted]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS —Filed August 15, 1960

1. Plaintiff opposes the motion for judgment on the pleadings and requests the Court to consider the affidavits of Angelika L. Schneider and Horst Kurnik filed herein not only as affidavits in support of plaintiff's motion for summary judgment but also in opposition to defendant's motion for judgment on the pleadings.

2. The grounds for opposition as a matter of law to the defendant's motion for judgment on the pleadings are the same reasons advanced as a matter of law in support of plaintiff's own motion for summary judgment.

Respectfully submitted,

Milton V. Freeman, 1229—19th Street, N.W., Washington 6, D.C.

Horst Kurnik, 27 William Street, New York 5, New York.

Of counsel: Arnold, Fortas & Porter, 1229—19th Street, N.W., Washington 6, D.C.

Date:

[fol. 31] Certificate of Service (omitted in printing).

[fol. 32]

[File endorsement omitted]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER AND JUDGMENT—August 17, 1960

Plaintiff having moved for summary judgment and defendant having moved for judgment on the pleadings, and the Court having considered the complaint, the answer and the affidavits filed herein as well as the previous proceedings herein, and being fully advised in the premises, and being advised of the order entered in this matter on July 19, 1960 by Judge Matthews, holding that no substantial constitutional question is presented by said complaint, and the Court being of the opinion that Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States,

It is hereby ordered, adjudged and decreed:

1. That the plaintiff's motion for summary judgment be and it is hereby denied, and

2. That judgment on the pleadings be and it is hereby entered for defendant, and the complaint be and it is hereby dismissed.

George L. Hart, Jr., Judge.

Date: August 17, 1960.

No objection as to form:

Milton V. Freeman, Counsel for plaintiff.

[fol. 33]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANGELIKA L. SCHNEIDER, Appellant,

v.

DEAN RUSK, individually and as Secretary of State, Appellee.

No. 16,002

DEAN RUSK, Secretary of State, Appellant,

v.

ANGELIKA L. SCHNEIDER, Appellee.

Appeals from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Chief Judge, and Bazelon and Burger, Circuit Judges.

JUDGMENT—May 11, 1962

These appeals came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court

(1) that in No. 15,959 the judgment of the District Court for the defendant on the pleadings and dismissing the complaint is hereby affirmed on the authority of *Lapides* v. *Clark*, 85 U.S.App.D.C. 101, 176 F.2d 619 (1949).

(2) that the appeal in No. 16,002 from the order of the District Court denying defendant's motion to dismiss

the complaint is dismissed for the reason that the order is not appealable. *Catlin* v. *United States*, 324 U.S. 229, 236.

Per Curiam.

Dated: May 11, 1962.

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. 251—October Term, 1962

ANGELIKA L. SCHNEIDER, Petitioner,

v.

DEAN RUSK, Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 18, 1963]

Per Curiam.

Trial of this case should have been before a three-judge District Court convened pursuant to 28 U. S. C. §§ 2282, 2284, as petitioner requested. Her complaint explicitly sought an "injunction restraining the enforcement, operation or execution of . . . [an] Act of Congress"—§ 352 (a)(1) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1484 (a)(1), which provides that a naturalized American citizen shall lose his nationality by "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . . ." The District Court concluded that petitioner's complaint presented no substantial constitutional issue and denied petitioner's motion to convene a three-judge court, relying on *Lapides* v.

Clark, 176 F. 2d 619 (C. A. D. C. Cir. 1949), cert. denied, 338 U. S. 860, in which the Court of Appeals for the District of Columbia Circuit had directly upheld the predecessor of a companion provision, § 352 (a)(2) of the 1952 Act, 8 U. S. C. § 1484 (a)(2), which deprived the naturalized American of his citizenship for residing for five years in any foreign state. The Court of Appeals' *per curiam* affirmance was also based on *Lapides*. Although no view is here intimated as to the merits of the constitutional question in the present case, we disagree with the conclusion of the courts below as to the substantiality of that issue. [fol. 35] The intervening decisions of this Court in *Peres* v. *Brownell*, 356 U. S. 44 and *Trop* v. *Dulles*, 356 U. S. 86, reveal that the constitutional questions involving deprivation of nationality which were presented to the district judge were not plainly insubstantial. The single-judge District Court was therefore powerless to dismiss the action on the merits, and should have convened a three-judge court. *Ex parte Northern Pac. R. Co.*, 280 U. S. 142, 144; *Stratton* v. *St. Louis, S. W. R. Co.*, 282 U. S. 10, 15; *Ex parte Poresky*, 290 U. S. 30; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713. The judgments below are vacated and the case is remanded to the District Court for expeditious action consistent with the views here expressed.

[fol. 36]

SUPREME COURT OF THE UNITED STATES

No. 251, October Term, 1962

ANGELIKA L. SCHNEIDER, Petitioner,

vs.

DEAN RUSK, etc.

JUDGMENT—February 18, 1963

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the District of Columbia Circuit.

On Consideration Whereof, it is ordered and adjudged by this Court that the judgments of the said United States Court of Appeals in this cause be, and the same are hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Columbia for expeditious action consistent with the opinion of this Court.

February 18, 1963

A true copy

Test:

John F. Davis, Clerk of the Supreme Court of the United States.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER VACATING ORDER AND JUDGMENT—March 6, 1963

Whereas this Court on August 17, 1960 entered an Order denying the plaintiff's motion for summary judgment and granting judgment on the pleadings for defendant and dismissing the complaint, and

Whereas the Supreme Court of the United States, by Per Curiam decision rendered in this cause on February 19, 1963, held that a Constitutional question was involved in this case and that a single Judge of the District Court was therefore powerless to dismiss the action on the merits, and

Whereas this Court has *sua sponte* reconsidered its Order and Judgment of August 17, 1960, in the light of the aforementioned Supreme Court decision, it is this 6th day of March, 1963,

Ordered, That the Order and Judgment entered herein on August 17, 1960 be, and the same hereby is, vacated and set aside.

George L. Hart, Jr., Judge.

[fol. 38]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, Plaintiff,

vs.

DEAN RUSK, individually and as Secretary of State, Defendant.

OPINION—Filed May 21, 1963

Milton V. Freeman, Werner J. Kronstein, and Robert E. Herzstein of Washington, D.C.; Horst Kurnik of New York, N.Y.; Charles A. Reich of New Haven, Conn.; and Arnold, Fortas & Porter of Washington, D.C., for plaintiff.

Archibald Cox, Solicitor General, Herbert J. Miller, Jr., Assistant Attorney General, J. William Doolittle, Assistant to the Solicitor General, Beatrice Rosenberg, J. F. Bishop, Attorneys, Department of Justice, Washington, D.C., for defendant.

Jack Wasserman, David Carliner, and Melvin L. Wulf of Washington, D.C., for American Civil Liberties Union as amicus curiae.

Before Fahy, Circuit Judge, and Keech and Matthews, District Judges.

Matthews, District Judge.

The plaintiff, a national of Germany at birth who became in 1950 a naturalized citizen of the United States, has been declared to have lost her American citizenship by reason [fol. 39] of residing continuously in the foreign country of her origin for three years. The issue she raises before the court is whether this divesture of citizenship accords with the Constitution. The statute[1] relied upon by the Government to effect the expatriation of plaintiff, hereafter referred to as Section 352(a)(1), reads in pertinent part:

> "(a) A person who has become a national by naturalization shall lose his nationality by—
>
> "(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . . "

Residence as the term is used in Section 352(a)(1) is defined as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections . . . and 352 . . . where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state . . . "[2]

In February 1960, plaintiff brought this suit for a judgment declaring her to be a citizen of the United States and enjoining the enforcement of Section 352(a)(1) by the Secretary of State. She moved for the convening of a three-judge court pursuant to 28 U.S.C. 2282 and 2284 to try the case. The District Court concluded that plaintiff's com-

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[1] Section 352(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1484(a)(1), successor and counterpart to Sec. 404 (b) of the Nationality Act of 1940, 54 Stat. 1137 at page 1170.

[2] Section 101(a)(33) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(33).

plaint presented no substantial constitutional issue and denied her motion to convene a three-judge court, relying [fol. 40] on *Lapides* v. *Clark*, 176 F.2d 619, cert. denied, 338 U.S. 860, rehearing denied, 338 U.S. 888, in which the Court of Appeals for the District of Columbia Circuit had directly upheld the predecessor of a companion provision[1] which deprived the naturalized American of citizenship for continuous residence for five years in any foreign state.

Thereafter, the court granted a motion of the defendant Secretary of State for judgment on the pleadings and on the basis of *Lapides* the Court of Appeals affirmed. But the Supreme Court vacated these judgments, stating in a per curiam opinion that its intervening decisions in *Perez* v. *Brownell*, 356 U.S. 44, and *Trop* v. *Dulles*, 356 U.S. 86, reveal that the constitutional questions involving deprivation of nationality which were presented to the district judge were not plainly insubstantial, and the case was remanded to the District Court for hearing on its merits by a three-judge court. *Schneider* v. *Rusk*, 372 U.S. 224. Accordingly this three-judge court has been convened, and the matters before the court are the motion of the plaintiff for summary judgment and that of the defendant for judgment on the pleadings.

The facts are not in dispute. The plaintiff was born in 1934 in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany, and in 1939 came to the United States with her family. In 1950 she became a natu- [fol. 41] ralized citizen of the United States through the naturalization of her mother. She lived in the United States from 1939 to 1954. During 1954 and 1955 she studied at a University in Switzerland and in the following year was a full-time student at the Sorbonne in Paris. Returning to the United States in April 1956, she was employed in New York for a few months and on June 6, 1956 left for Germany where she married a German national on July 4, 1956. Since that time plaintiff has lived continuously with her husband in Germany for a period of more than three years except

[1] Section 404(c) of the Nationality Act of 1940, 54 Stat. 1137 at page 1170, now Section 352(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1484(a)(2).

for one visit of six weeks to relatives in the United States in 1957. She intends to continue to live in Germany and has no definite intention to return to the United States to reside. In June 1959 the United States Consulate at Dusseldorf refused to grant an extension of the plaintiff's United States passport, contending that she had lost her American citizenship. The plaintiff was requested by the American Consulate in September 1959 to surrender her naturalization certificate which she did under protest. On November 25, 1959, the plaintiff was given a "Certificate of the Loss of the Nationality of the United States." The Board of Review on the Loss of Nationality in the State Department in Washington affirmed the previous administrative decision that plaintiff had expatriated herself pursuant to Section 352(a)(1). This action on January 20, 1960 was the final administrative determination of the State Department.

The plaintiff is now stateless, the provision of the German Nationality Act imposing German nationality upon a [fol. 42] woman marrying a German national having been repealed.[4] But upon her application plaintiff may easily resume German citizenship because of her husband's German nationality.[5] She has not done so because of her desire to retain United States citizenship. Two sons born in Germany of her marriage, one in 1957 and the other in 1958, have been registered with the United States Consulate as citizens of the United States but they are also German nationals.[6] Moreover, each child is subject to loss of his American citizenship if he fails to meet the requirement of continuous physical presence in the United States for at least five years following his attainment of the age of fourteen years and previous to his arrival at the age of twenty-eight years.[7]

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[4] Laws Concerning Nationality, U.N.Doc. No. ST/LEG/SER. B/4, p. 179, Sec. 6 & note 4 on pp. 178-179, also p. 187.

[5] Brief For Petitioner in the Supreme Court of the United States Oct. Term 1962, No. 251, p. 38, Note 15.

[6] Laws Concerning Nationality, U.N.Doc. No. ST/LEG/SER. B/4, p. 179, Sec. 4.

[7] 8 U.S.C. 1401(b). See also 8 U.S.C. 1482 regarding dual nationals.

In challenging Section 352(a)(1) plaintiff contends that it bears no reasonable relationship to any power granted to Congress and therefore is outside the bounds of the Constitution. She maintains that she cannot validly be expatriated against her will and that her American citizenship remains intact, despite her continuous residence for three years in the foreign country of her origin. She also argues that since native-born citizens are not divested of their American nationality for prolonged residence abroad, Section 352(a)(1) discriminates against naturalized citizens and thus denies them liberty and due process of law, contrary to the Fifth Amendment. A further contention of plaintiff is that her purported deprivation of citizenship constitutes cruel and unusual punishment in contravention of the Eighth Amendment to the Constitution.

[fol. 43] From the historical evolution of the legislation in question it appears that Congress was attempting to exercise its power to regulate foreign affairs when it decreed that continuous residence for three years by a naturalized citizen in the country of his origin should result in expatriation. While the Constitution contains no specific grant to Congress of power to legislate for the effective regulation of foreign affairs, "there can be no doubt of the existence of this power in the law-making organ of the Nation." *Perez* v. *Brownell*, 356 U.S. 44. As was there said at page 57:

> "The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests."

Prior to the Nationality Act of 1907 Congress had not defined by statute or otherwise what may constitute expatriation, and the Department of State was forced to look elsewhere for an enumeration of the acts which might have that effect.[8] The policy of the United States varied as to the assistance and protection which it would afford naturalized citizens who returned to their native land. The many executive utterances on this subject throughout the 19th Century show the magnitude of the problem.[9] It is clear that even prior to 1907 the State Department considered in many instances that a naturalized citizen who returned to [fol. 44] his native land for a protracted period had expatriated himself or forfeited the protection of this Government, especially if he manifested no intention of returning to the United States.[10]

The rationale for this policy was set forth in a Circular[11] of March 27, 1899, issued by Mr. Hay, Secretary of State, to United States diplomats and consular officers, as follows:

> "This Government does not discriminate between native-born and naturalized citizens in according them protection while they are abroad . . . But in determining the question of conservation of American citizenship and the right to receive a passport, it is only reasonable to take into account the purpose for which the

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[8] Fish to Washburne, June 28, 1873, 3 Moore, Digest of International Law (1906), 712; President Grant, annual message, Dec. 1, 1873, *id.*, at pp. 712-13; *Perez* v. *Brownell*, 256 U.S. 44, at page 49.

[9] 3 Moore, Digest of International Law, pp. 562-715, 735-757, 766-771.

[10] E.g., Smith to Hance, Jan. 21, 1867, 3 Moore, Digest of International Law at p. 737; Frelinghuysen to Herdocia, Dec. 8, 1882, *id.* at p. 739; Davis to Barnett, Aug. 20, 1884, *ibid;* Bayard to Lee, July 24, 1886, *id.* at pp. 740-741; Rives to Proios, Oct. 25, 1888, *id.* at pp. 741-742; Gresham to Terrell, Aug. 27, 1894, *id.* at p. 743; Adee to Little, July 13, 1895, *ibid;* Fish to Hall, May 3, 1869, *id.* at p. 766; Williams, At.-Gen., Aug. 20, 1873, *id.* at p. 768; Frelinghuysen to Lowell, Feb. 27, 1884, *ibid;* Porter to Curry, Jan. 4, 1886, *id.* at pp. 768-769; Porter to Meyer, June 30, 1887, *id.* at p. 769; Uhl to Willis, May 14, 1895, *id.* at p. 770; and see also *id.* at pp. 947-950, and 952-966.

[11] 3 Moore, Digest of International Law, p. 950.

citizenship is obtained. A naturalized citizen who returns to the country of his origin and there resides without any tangible manifestation of an intention to return to the United States may . . . generally be assumed to have lost the right to receive the protection of the United States. His naturalization in the United States can not be used as a cloak to protect him from obligations to the country of his origin while he performs none of the duties of citizenship to the country which naturalized him. The statements of loyalty to this Goverment which he may make are contradicted by the circumstance of his residence, and are open to the suspicion of being influenced by the advantages he derives by avoiding the performance of the duties of citizenship to any country. It is not to be understood by this that naturalized American citizens returning to the country of their origin are to be refused the protection of a passport. On the contrary, full protection should be accorded to them, until they manifest an effectual abandonment of their residence and domicil in the United States."

[fol. 45] Until 1868 there was doubt as to how far the doctrine of perpetual allegiance derived from our former colonial relations with Great Britain was applicable to American citizens. In that year Congress swept away these doubts by decreeing that it is "a natural and inherent right of all people" to divest themselves of allegiance to any state, 15 Stat. 223, §1999, being motivated, at least in part, by the refusal of England and other nations to recognize the right in naturalized Americans to cast off their former allegiance. This legislation has been applied to the divestment by native-born and naturalized Americans of their United States citizenship. But Congress did not in this law indicate what acts were to be deemed to work expatriation.

At about this same time the United States negotiated a naturalization treaty with the North German Confederation by which each country agreed to recognize the naturalization of its own natives by the other. This treaty further provided that if a German naturalized in America renewed

his residence in North Germany, without the intent to return to America he would be held to have renounced his naturalization in the United States and that the intent not to return could be held to exist when the person naturalized in the one country resided more than two years in the other country. 15 Stat. 615, 616-617. Thereafter the United States concluded similar naturalization treaties with other nations. E.g., 15 Stat. 687 (Mexico), 17 Stat. 941 (Denmark). However, some nations, including a number of important ones, refused to enter into such treaties. E.g., 3 Moore, Digest of International Law, pp. 604-607 (Greece), 609 (Italy), 622 (Russia). Moreover, the treaties themselves required administrative construction. 3 *id.*, pp. 744-757.

[fol. 46] Meanwhile, the Executive Department urged Congress to enact further legislation defining the acts by which citizens should be held to have expatriated themselves, especially in view of the problems raised by citizens residing permanently abroad. E.g., Message of President Grant to Congress, Dec. 1, 1873, 6 Messages and Papers of the Presidents, Richardson Ed., 1897, pp. 4193-4194, and Message of President Grant to Congress, Dec. 7, 1874, *id.* at pp. 4245-4246. In his message of December 1, 1873, President Grant pointed out:

> "In some cases . . . naturalized citizens of the United States have returned to the land of their birth with intent to remain there, and their children, the issue of a marriage contracted there after their return, and who have never been in the United States, have laid claim to our protection when the lapse of many years had imposed upon them the duty of military service to the only government which had ever known them personally."

In his message of Dec. 7, 1874, President Grant said:

> "I have again to call the attention of Congress to the unsatisfactory condition of the existing laws with reference to expatriation and the election of nationality. . . . Congress by the Act of the 27th of July, 1868, asserted the abstract right of expatriation as a fundamental principle of this Government. Notwithstanding

such assertion and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least great question. In some cases the provisions of the treaties furnish some guide; in others it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims to citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere."

[fol. 47] Finally in 1906 a Senate Resolution and a recommendation of the House Committee on Foreign Affairs called for an examination of the problems relating to American citizenship, expatriation, and protection abroad. This led to the appointment by the Secretary of State of a Citizenship Board composed of the Solicitor of the State Department, the Minister to the Netherlands and the Chief of the Passport Bureau. After a study this Board made a report with recommendations. In its report, H.R. Doc. No. 326, 59th Congress, 2nd Session, the Board noted at pages 25-27 that "Expressed renunciation of American citizenship is . . . extremely rare; but the class of Americans who separate themselves from the United States and live within the jurisdiction of foreign countries is becoming larger every year, and the question of their protection causes increasing embarrassment to this Government in its relation with foreign powers"; that immigration "to the United States has of recent years reached proportions hitherto unheard of, and many of these immigrants will become naturalized citizens of the United States"; that "naturalized citizens are more apt to go abroad than native citizens";

that having "already changed their domicile, they are more apt to change it again"; that one reason "why the attempts which have been made in the past to secure a legislative definition of expatriation have failed is undoubtedly because the necessity has been slight in comparison with the necessity which now exists"; that it "is difficult to determine when those who have been absent from the United States for a long time and who give no tangible evidence of an intention of returning should be left without protection"; that when "they are refused they are aware that it is in the discretion of the Executive to accord them protection;" that "they are aware that the policy toward them has not been stable and that one official may grant what another [fol. 48] has refused"; that they "do not accept, therefore, a refusal as final, but strain their energies to induce a change of decision, and their cases remain open while their status remains undefined"; and that it "seems to be clear that these people have by their own act worked their own expatriation, and that their status should be put beyond the uncertainty or fluctuations of executive policy by a declaratory law."

The Board recommended that a law be passed providing among other things that "expatriation of an American citizen may be assumed" when in time of peace, he obtains naturalization in a foreign state, or engages in the service of a foreign state where such service involves the taking of an oath of allegiance to that state, or "becomes domiciled in a foreign state, and such domicil may be assumed when he shall have resided in a foreign state for five years without intent to return to the United States", the presumption of expatriation to be rebuttable. *Id.* at p. 23.

On the basis of this report and recommendations Congress in passing the Nationality Act of 1907, 34 Stat. 1228, provided in Section 2 that when any naturalized citizen had resided for two years in the foreign state from which he came, or for five years in any other foreign state, it would be presumed that he had ceased to be an American citizen, and the place of his general abode would be deemed his place of residence during said years. However, it was further provided that such presumption might be overcome

on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States under such rules and regulations as the Department of State might prescribe. It was stated in the House by the representative [fol. 49] who introduced the measure that the provisions regarding naturalized citizens were designed to discourage people from evading responsibilities both to other countries and to the United States and to save our Government from "becoming involved in any trouble or question with foreign countries where there is no just reason." 41 Cong. Rec. 1463-1464.

However, the provision of the 1907 law regarding expatriation of naturalized citizens did not prove satisfactory. In 1928 Attorney General John G. Sargent described it as being "so loosely drawn that its operation and effect have been in doubt ever since its passage." 35 Ops. Attys. Gen. 399, 404. He deemed it "obvious that clarifying legislation is desirable", citing the 1795 decision of the Supreme Court in *Talbot* v. *Jansen*, 3 Dall. 133, 154, in which it is declared that a statute of the United States "relative to expatriation, is much wanted" and besides "ascertaining by positive law the manner in which expatriation may be effected would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point."

At the request of the House Committee on Immigration and Naturalization, 86 Cong. Rec. 11943, President Roosevelt appointed in 1933 a committee composed of the Secretary of State, the Attorney General and the Secretary of Labor to study the existing laws governing nationality, to codify them, and to recommend such changes as might seem desirable. Five years were spent in study and research by specialists representing the three departments. A draft code submitted by this committee contained a provision that a naturalized citizen (unless he came within [fol. 50] specified exceptions) should lose his citizenship by residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which his place of birth is situated. Nationality Laws of the United States, 1938, Part 1, House Committee Print, 76 Congress, 1st Sess., p. 69.

The Committee concluded in its report that the existing law had been found "to a considerable extent to be insufficient and unsatisfactory, since, as construed by the courts, the presumption of loss of citizenship arising under its terms never became final, regardless of the length and cause of the foreign residence . . . " *Id.* p. 70. The report further pointed out that

> ". . . . before an alien is admitted to the privilege of citizenship, under the law of the United States, he is required to declare under oath that he intends to reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted.
>
> "The problem presented by naturalized citizens residing, for insufficient reasons, in the foreign states in which they were born or of which they were formerly nationals, of whom there are thousands at the present day, has been a cause of difficulty and embarrassment to the Government of the United States in its efforts to extend protection to other naturalized citizens in meritorious cases."

Consideration was given by the Committee of whether the loss of nationality should be made to result directly from the fact of foreign residence, or should be made dependent upon proceedings in the courts. It was concluded by the committee that the termination of American nation-
[fol. 51] ality should be *automatic*, resulting directly from the fact of foreign residence since proceedings in the courts would be cumbersome, long drawn out and expensive to the Government. It was deemed desirable, however, to frame the provision in such a way as to avoid making the termination dependent upon the judgment or discretion of a diplomatic or consular officer or of officers of the Department of State itself or any other branch of the executive. It was thought that the function of these officers should be limited as far as possible to the findings of fact and the application of the statute to each case accordingly. *Id.* at p. 71.

The report of the committee appointed by President Roosevelt further stated that while a provision for loss of nationality in cases of naturalized citizens who reside for three years in their countries of origin may appear to be "somewhat drastic", it was believed to be

> "fully warranted by the numerous cases which have been brought to the Department's attention in past years, especially in connection with applications for passports or consular registration, for diplomatic protection, or for the support of claims against the governments of such countries. This provision is not in conflict with the position taken by the Government of the United States in past years with regard to the protection of naturalized citizens or with the treaties on that subject to which the United States is, or has been a party . . . On the contrary, it agrees in spirit with the provisions in the naturalization treaties concerning naturalized citizens who return to their countries of origin for permanent or indefinite residence. It is not to the advantage of the United States to attempt to extend diplomatic protection to such persons, who are a distinct liability, rather than an asset, to this country. Moreover (what is quite important), it is believed that a definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalization to conclude such treaties and to recognize the American na- [fol. 52] tionality of the persons concerned when they return to their countries of origin for legitimate objects and for residence of a temporary character." *Id.* at page 71.

In stating their reasons for support of a provision denationalizing naturalized citizens for prolonged residence in the foreign countries in which they were born or of which they were formerly nationals, the committee named by President Roosevelt, pointed out, *Id.* at page 71, that

> "Reports from diplomatic and consular officers show that, in the vast majority of cases of naturalized citi-

zens residing abroad, they have their residence in such foreign states. The number of these cases is very large, and they are a constant source of irritation. Their existence has rendered it difficult to make fully effective the principle, which this Government has long sought to maintain, that naturalization involves a complete change of national character and termination of the prior allegiance . . ."

"Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated. Naturally, in these cases, identification with the native population is much more likely to occur than in the cases of naturalized citizens who reside in foreign countries other than those from which they came."

"For the reasons mentioned, Congress, in the provision of the second paragraph of section 2 of the act of March 2, 1907 (34 Stat. 1228) drew a clear distinction between native and naturalized citizens with reference to the effect of foreign residence upon the right to continued recognition and protection as citizens of the United States. The presumption of loss of citizenship, provided therein, as a result of protracted residence abroad, is expressly limited to naturalized citizens."

[fol. 53] The report then described 13 cases as "illustrative of many presented to the Department of State in recent years, in which naturalized citizens of the United States who had resumed residence in their native lands called upon the Department for recognition and protection as citizens of the United States." *Id.* at p. 72.

The letter of the Committee transmitting its report and draft code to President Roosevelt included the following statement:

"Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from transmitting American nationality to their foreign-born children having little or no connection with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside." *Id.* at p. vii.

The letter also stated that none of the provisions in the draft code submitted by the committee were "designed to be punitive or to interfere with freedom of action" but were intended to deprive of citizenship those persons who had shown that "their real attachment is to the foreign country and not to the United States." *Id.* at p. vii.

After the President transmitted the report and draft code of the committee to Congress in 1938 the code was introduced as a bill in the House and extensive hearings were held by the House Committee on Immigration and Nationalization. Mr. Flournoy, Assistant Legal Adviser of the State Department, in commenting on the provision regarding naturalized citizens stated:

> [fol. 54] "We have every day in the State Department cases of persons applying to us for passports or protection, or asking us to support claims, who have been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years." *Id.* at p. 134.

At the conclusion of the hearings in June 1940 a new bill was drawn up and introduced as H.R. 9980. Although there were changes from the draft code submitted by the President, the Nationality Act adopted in 1940 incorporated—as Section 404(b) the precise provision of the draft code for expatriating naturalized citizens who reside in their country of origin for three years. 54 Stat. 1170. Since then the provision has been incorporated into the Immigration and Nationality Act of 1952 as Section 352(a)(1).

It seems plain from the background of Section 352(a)(1) that problems in the field of international relations gave rise to its enactment by Congress—problems attributable to naturalized citizens who take up residence for prolonged periods in the foreign country of their origin.

The question of the power of Congress to enact legislation depriving individuals of their American citizenship was first raised in the courts by *Mackenzie* v. *Hare*, 239 U.S. 299. The plaintiff in that case, Mrs. Mackenzie, a native-born American married a British subject permanently residing in this country. They continued after their marriage to reside here. There was then in force a statute [since repealed] providing: "That any woman who marries a foreigner shall take the nationality of her husband." 34 Stat. 1228. Registration as a voter was denied Mrs. Mackenzie on the ground that she had ceased to be an American citizen. The question before the Supreme Court was: *"Did she* [fol. 55] *cease to be a citizen by her marriage?"* 239 U.S. 307. She had never intended or desired to give up her American citizenship. She challenged the constitutionality of the statute insisting that it was "beyond the authority of Congress" to take her citizenship away, and that her citizenship "was an incident to her birth in the United States, and, under the Constitution and laws of the United States, it became a right . . . which could not be taken away from her except as a punishment for crime or by her voluntary expatriation." The court upheld her expatriation, stating in part:

> "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries . . . It may be conceded that a change of citizenship cannot be arbitrarily imposed . . . The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and her earnest assertion of it. But there is involved more than per-

sonal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . The marriage of an American woman with a foreigner . . . may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation . . . This is no arbitrary exercise of government . . . It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies."

Recent cases bearing on expatriation of a citizen without his consent include: *Perez* v. *Brownell*, 356 U.S. 44, and *Trop* v. *Dulles*, 356 U.S. 86, decided in 1958; *Kennedy* v. *Mendoza-Martinez* and *Rusk* v. *Cort*, 372 U.S. 144, decided in 1963. Each of these cases involved a man who had acquired United States citizenship by birth in this country, and had committed some act which a statute of the United States ordained should automatically terminate his American nationality.

[fol. 56] In *Perez* v. *Brownell, supra*, the plaintiff, Perez, was born in Texas. He moved to Mexico with his parents when he was about ten years old. He entered the United States in each of the years 1943 and 1944 for temporary employment. At that time he was about 34 years of age and claimed to be a native-born citizen of Mexico. In 1946 he voted in Mexico in a political election. In 1952 he again entered the United States for employment. Following an order for his deportation in 1953 as an alien not in possession of a valid immigration visa, he brought suit for a judgment declaring him to be a national of the United States. Relief was denied on the ground that he had expatriated himself under a statute imposing loss of nationality upon a citizen for "voting in a political election in a foreign state . . ." 8 U.S.C. 1481(a)(5).

The rationale of the Supreme Court in *Perez* was that the withdrawal of citizenship of Americans who vote in foreign political elections is reasonably calculated to effect the avoidance of embarrassment in the conduct of foreign relations and that Congress acted "pursuant to its powers to regulate the relations of the United States with foreign

countries" when it provided "that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship." Accordingly the denationalization of Perez for such voting was sustained. Four members of the court dissented, three on the ground that Congress lacks power to take away the citizenship of a native-born American. The fourth dissenter, although believing that Congress may expatriate a citizen for an act likely to embarrass the Government in the conduct of foreign affairs, deemed the statute "too [fol. 67] broadly written to be sustained on that ground."

In *Trop* v. *Dulles, supra,* the alleged expatriating act was "deserting the military . . . forces of the United States in time of war" followed by conviction and dishonorable discharge. 8 U.S.C. 1481(a)(8). In *Kennedy* v. *Mendoza-Martinez* and in *Rusk* v. *Cort, supra,* the alleged expatriating act was remaining outside the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military or naval forces of the United States. 8 U.S.C. 1481(a)(10). In each of these three cases the majority of the Supreme Court characterized the statute involved as punitive and held it unconstitutional, four members of the court dissenting on the ground that the statute resulted from the proper exercise by Congress of its war powers.

We turn now to the questions presented in this case, bearing in mind the diplomatic and legislative history already related as well as the Supreme Court decisions to which we have referred. The plaintiff says that Section 353(a)(1) bears no reasonable relation to any power granted to Congress. We believe, however, that the requisite rational relation exists between this statute and the power of Congress to deal with foreign affairs. Stated differently, we believe that the denationalization imposed by this provision is reasonably calculated to effect the end that is within the power of Congress to achieve—the avoidance of embarrassment and controversies in the relations of the United States with other countries. "The termination of citizenship terminates the problem." *Perez* v. *Brownell,* 356 U.S. 44 at 60.

[fol. 58] Now we come to the contention of the plaintiff that the challenged statute is discriminatory and violative of due process in that it withdraws citizenship from naturalized Americans for continuous foreign residence while native-born Americans, without losing their citizenship, may reside abroad indefinitely. Like any other congressional enactment, a law passed by Congress in the exercise of its power to regulate foreign affairs must meet the requirement of due process. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 at 164. The due process guaranty of the Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, at 525.

Due process does not require that all citizens be treated in the same way. *Hirabayaski* v. *United States*, 320 U.S. 81. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 at 895. In legislating within the scope of its powers, a lawmaking body has discretion in classification, and due process is not offended where the classification has a rational basis and is reasonably related to the legislative purpose. Under this concept, for example, the Supreme Court upheld in *Mackenzie* v. *Hare, supra*, a federal law divesting the citizenship of women but not of men marrying foreigners, and in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, a state law for the setting of minimum wages for women even though the law did not extend to men. See also *Hoyt* v. *Florida*, 368 U.S. 57.

[fol. 59] The statute which the plaintiff challenges applies only to a particular class of naturalized citizens—those residing continuously for three years in the foreign country of their birth. It does not apply to other naturalized citizens nor to native-born citizens. By this statute the Congress recognized, on the basis of experience and history, that the problem of naturalized citizens residing at length in the country of their origin has far greater potential for causing international problems than foreign residence by citizens under other circumstances.

Stated differently, the application of the statute in question to foreign-born persons who become naturalized in the United States and return to reside for prolonged periods in the country of their origin is accounted for by the long history of friction between the United States and other nations relative to this particular class of naturalized citizens. The statute deals with them as the principal source of the problem of maintaining international relations in the face of demands for protection and similar relief.

If a law presumably provides a remedy where it is most needed, it is not to be overthrown because there are other instances to which it might have been applied. *West Coast Hotel Co.* v. *Parrish, supra,* at page 400.

We think that Section 352(a)(1) satisfies the requirement of due process. It rests on a rational foundation, and has a substantial relation to the object which Congress sought to accomplish by its enactment.

[fol. 60] The remaining principal contention of the plaintiff is that the withdrawal of nationality under the challenged statute constitutes cruel and unusual punishment in a constitutional sense. Congress, in enacting this legislation, did not aim at punishment of the persons coming within its purview, but at lessening friction and controversies in our relations with other nations. In the light of these circumstances, it cannot fairly be said that the statute is punitive in nature. *Flemming* v. *Nestor,* 363 U.S. 603, 613 et seq.

We touch now on some of the arguments urged upon us by the plaintiff in support of her main contentions.

As the plaintiff is not a dual national it is suggested that her foreign residence does not entail any problems incident to a dual nationality status. However, it is to be noted that in each of the two years following her marriage the plaintiff gave birth to a son in Germany who is now possessed of dual nationality, that is, the nationality of Germany and the nationality of the United States. International complications may reasonably be foreseen from such a situation since dual nationality "refers to the fact that two States make equal claim to the allegiance of an individual at the same time." *Perkins* v. *Elg,* 307 U.S. 325, at 344.

Moreover, dual nationality has long been a perennial source of friction between nations. Section 352(a)(1) having terminated the plaintiff's American citizenship in 1959, any child or children since or hereafter born to her in Germany would have the nationality of Germany but not that of the United States.

[fol. 61] The Congress that passed the Nationality Act of 1940 (the statute that brought Section 352(a)(1) to its present form) was fully conscious of the problems incident to dual nationality. Among the reasons Congress had for terminating the American nationality of naturalized citizens taking up residence abroad is that such termination will prevent them from transmitting American nationality to their foreign born children and embroiling this government in controversies which they may have with the governments of the foreign countries in which they reside.[12]

According to the plaintiff, the upholding of the challenged statute "as a proper exercise of the foreign affairs power would require a showing that the mere residence abroad of naturalized citizens in and of itself raises serious problems affecting the conduct of our foreign affairs . . ."[13] However, according to the Supreme Court in *Borden's Co. v. Ten Eyck*, 297 U.S. 251, at 263:

> "Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary."

The long recognized test is set forth in *Borden's Co. v. Baldwin*, 293 U.S. 194 at 209, by the then Chief Justice [fol. 62] (Charles Evans Hughes) as follows:

> "But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption . . . When the clas-

[12] 86 Cong. Rec. 11944, 11949. See also Nationality Laws of the United States, 1938, part 1, Committee Print, 76th Cong., 1st Sess., at p. vii.

[13] Brief for Petitioner in the Supreme Court of the United States, Oct. Term 1962, No. 251, pp. 34-35.

sification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

Certainly in this case there has been shown a reasonably conceivable relation between the method chosen and the problem which Congress saw and sought to remedy under its foreign affairs power.

It has also been suggested that foreign residence by the plaintiff is a neutral act. However, settlement by a naturalized citizen in the foreign country of his nativity and the centering there of all his primary interests, as the plaintiff has done, is conduct traditionally regarded by this government as evidence tending to show an intentional surrender of American citizenship or as importing some transfer of allegiance to the foreign country.[14]

Finally, the plaintiff insists that she is an American by training, in thought and in feeling, and that she values highly her American citizenship. But these sentiments, however sincere, were not conducive to her retention of residence in the United States. Nor is there anything in the [fol. 63] record to show that since leaving this country she has performed any of the duties of American citizenship or that she ever intends to return to assume them. By voluntarily going to the foreign country of her birth and there continuously residing for three years, she has brought on her expatriation.

We conclude that the challenged statute must be upheld as a constitutional exercise by Congress of its power to regulate foreign affairs, and hence that the plaintiff is not a citizen of the United States. Accordingly the motion of the plaintiff for summary judgment will be denied, and

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[14] H.R. Doc. No. 326, 59th Cong. 2d Sess., p. 27; 3 Moore, Digest of International Law, p. 739.

the motion of the defendant for judgment on the pleadings will be granted.

Burnita Shelton Matthews, United States District Judge.

Richmond B. Keech, United States District Judge.

[fol. 64] FAHY, Circuit Judge, dissenting.

It is apparent from the review of relevant legislation in the majority opinion that a strong case exists for holding that Congress reasonably concluded that a relation or nexus exists between the conduct of foreign affairs and residence abroad of some naturalized citizens. This I would not dispute. But when we consider whether the means adopted, and applied in this case, to further the conduct of foreign affairs meet the requirements of due process of law a more difficult problem is presented. Thus, such relation to or nexus with foreign affairs (1) may exist with respect to some native-born citizens who reside abroad, and is not limited to naturalized citizens; (2) is not shown to exist in all cases of naturalized citizens whose residence abroad brings them within Section 352(a)(1); (3) appears not to have been weighed by Congress in connection with the impact of Section 352(a)(1) upon the citizenship of one group of Americans vis-a-vis another; (4) is with respect to aspects of foreign affairs which are administrative and routine in nature rather than those ordinarily associated with the authority of the Executive and of Congress to conduct the foreign affairs of the nation; (5) is largely due to problems arising from dual nationality; (6) creates problems not shown to be in-
[fol. 65] capable of reasonable solution by means less drastic than the total deprivation of nationality.

Conscious of the deference the courts must accord to the Acts of Congress, conscious also of the judicial obligation when the application of an Act to an individual deprives him or her of the priceless attribute of American citizenship, and renders him or her stateless, *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958), and conscious further of the characterization by the Supreme Court of such deprivation in other

circumstances as a cruel and unusual punishment, I conclude for the reasons now to be discussed that the application of Section 352(a)(1) so as to deprive plaintiff of her citizenship by operation of law would be inconsistent with due process of law.

Legislation seeking to terminate nationality has been considered by the Supreme Court in three recent cases. *Perez* v. *Brownell*, 356 U.S. 44 (1958), *Trop* v. *Dulles*, *supra*, and *Kennedy* v. *Mendoza-Martinez*, and *Rusk* v. *Cort*, 372 U.S. 144 (1963). In *Perez* denationalization of a native-born was upheld under Section 401(e) of the Nationality Act of 1940, now part of Section 349 of the Act of 1952, 8 U.S.C. §1481(a)(5), which provides for the loss of nationality by

> voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. . . .

[fol. 66] A nexus was found between the power of Congress over the conduct of foreign affairs and "active participation, by way of voting, of American citizens in foreign political elections." 356 U.S. at 59 and 60. It was said that withdrawal of citizenship was reasonably calculated to effect an end which Congress could lawfully achieve, namely, the avoidance of embarrassment in the conduct of our foreign relations. The Court added, however,

> [T]he fact is not without significance that Congress had interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

356 U.S. at 60-61.

In *Trop* v. *Dulles*, *supra*, decided the same day, the Court held that a native-born American did not lose his citizenship and become a stateless person as a result of a court martial conviction for desertion followed by a dishonorable

discharge. In so deciding the Court held Section 401(g) of the Nationality Act of 1940, as amended, to be unconsti-
[fol. 67] tutional.[1] The Chief Justice, joined by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Whittaker, while accepting *Perez* as upholding congressional authority to denationalize—contrary to their dissenting views in *Perez*—[2] as distinct from recognizing the right of voluntary expatriation, nevertheless concluded that to terminate Trop's nationality under Section 401(g) would be cruel and unusual punishment, violative of Article VIII of the Constitution. Mr. Justice Brennan joined in holding the Section unconstitutional. He pointed out that the conditions which led him to sustain denationalization in *Perez* were not met in *Trop;* there was not the requisite rational relation between Section 401(g) and the power relied upon by Congress to support the deprivation, namely, the power "to raise and maintain military forces to wage war."

In *Kennedy* v. *Mendoza-Martinez, supra,* which I shall refer to without separate mention of the companion *Cort* [fol. 68] case, the Court held invalid Section 401(j) of the Nationality Act of 1940, like §349(a)(10) of the Act of 1952, 8 U.S.C. §1481(a)(10), which sought to deprive an American of his nationality for departing from and remaining outside the jurisdiction of the United States in time of war for the purpose of evading military service. As in *Trop* the Court held that this was punishment for the proscribed conduct and, all else aside, could not be inflicted in a manner which did not comply with the procedural safeguards

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[1] This Section provides that a person who is a national of the United States, whether by birth or nationality, shall lose his nationality by,

> Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces . . .

now embodied in the 1952 Act as 66 Stat. 267, 8 U.S.C. §1481(a)(8).

[2] Mr. Justice Whittaker, dissenting from the result reached in *Perez,* did not reach the constitutional question in that case.

of the Bill of Rights, particularly those of the Fifth and Sixth Amendments.

In our own earlier case of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F.2d 619 (1949), denaturalization was upheld under the statutory provision: "A person who has become a national by naturalization shall lose his nationality by . . . (c) residing continuously for five years in any foreign state" with exceptions not applicable. Judge Edgerton dissented on the grounds (1) Congress may not discriminate against naturalized citizens and (2) arbitrary discrimination is not due process of law. He relied in part upon *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), and the opinion of Chief Justice Marshall in *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738 (1824). Citing *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915), the opinion of the majority in *Lapides* referred to the implied power of Congress to provide for denationalization upon the basis of a [fol. 69] classification which had a reasonable relation to a legitimate legislative end. The end sought was to lessen friction with foreign governments, and the legislation was also said to deal with a condition "voluntarily brought about by one's own acts, with notice of its consequences," for which reason it was said there was concurrence by the citizen in the loss of nationality. The intervening Supreme Court opinions, both majority and minority, in *Perez*, *Trop* and *Mendoza-Martinez*, do not rely upon a theory of concurrence, and so I do not accept the views in that regard expressed in *Lapides*. Voluntary residence abroad of a nationalized citizen for a longer period than is specified in Section 352(a)(1) does not constitute voluntary expatriation. Such residence does not deprive the national of the right to challenge the validity of the Section.

Coming now to the earlier Supreme Court case of *Mackenzie*, leaned upon in *Lapides*, it was there held that a statute which provided that "any American woman who marries a foreigner shall take the nationality of her husband"—a provision no longer in our statutes—involved the ancient principle of identity of husband and wife, then to some degree still adhered to. This permitted Congress to impute to the wife a kind of voluntary renunciation of

citizenship or expatriation. Without attempting to explore the areas within which the law may treat the sexes dif-
[fol. 70] ferently—the power to do so consistently with due process is hardly deniable—it is noted that the Chief Justice, dissenting in *Perez*, pointed out that the effect of *Mackenzie* was only to hold in abeyance the citizenship of the American woman, rather than to terminate it. 356 U.S. at 69-73.[3]

Savorgnan v. *United States*, 338 U.S. 491 (1950), was also relied upon in *Lapides*. There the native born American was found to have expatriated herself by applying for and obtaining naturalization as a citizen of Italy and by taking an oath of allegiance to the King of Italy. In thus expatriating herself she exercised a right long recognized by the United States and restated in *Trop*.

I come to consider the present case in light of the foregoing decisions, particularly those recently decided by the Supreme Court. In the first place the statute has about it something of the nature of legislative banishment. It applies only to a well defined group of citizens, who are sub-
[fol. 71] jected to a particular deprivation to follow automatically from conduct the statute proscribes, which takes no account of variations among individual cases. It appears to be an effort to regulate, although indirectly, conduct that occurs only in a foreign state, engaged in by persons whose presence there might be troublesome. Advised that it was difficult to prevent or remedy locally in the foreign states, through diplomatic channels, whatever the "difficulty and embarrassment" might be, and eschewing other possible remedies should embarrassment in fact occur, Congress was persuaded to legislate a process which cuts off the offending citizen from the American body

[3] In his dissenting opinion in *Mendoza-Martinez*, in which Mr. Justice White joined, Mr. Justice Stewart stated: "This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country." 372 U.S. at 214. And it cannot fairly be said that the present case is of that character. In this connection it is of some significance that plaintiff is not a dual national.

politic.[4] The majority opinion refers to the statement in *Perez* that this terminates the problem by terminating citizenship. Such a remedy for the problem posed by the Ex- [fol. 72] ecutive in 1938 and involved in the present case, though not in *Perez*, raises constitutional questions which are not answered by pointing to the administrative convenience to be achieved in this manner, the principal basis which was advanced for the remedy.[5] President Truman's Commission on Immigration and Naturalization in 1953 said the following about the denaturalization provisions here involved:

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[4] It seems fairly clear from the discussion centering upon the 13 illustrative cases cited in support of Section 352(a) when it came before Congress in 1938, that what was sought to be avoided was the necessity in each case to decide—either administratively or judicially—whether an individual had abandoned his American citizenship by continued residence in the land of his birth or prior nationality. These illustrative cases do not disclose what disputes arose, if any, between the Government of the United States and the foreign governments in connection with the various individual claims for passports, registration, or presentation of claims. Rather the fact merely of foreign residence for various periods and under such circumstances as were said to indicate no present intention to resume United States residence seems to be the embarrassing element in these cases. See *Nationality Laws of the United States*, House Committee Print, Part I, pp. 72-76 (1938).

[5] See note 4, *supra*. The problem seems to have been one of the Government's unwillingness to process legitimate claims of a citizen like presentation of a claim against the host state or issuance of a passport. In some of the cases cited the person involved had served in a foreign army, but this is separately dealt with under the 1940 legislation. Furthermore questions of re-naturalization by another state were present, sometimes with an indication that it may have been involuntarily imposed. In this connection the statement of Secretary of State Bayard, in regard to such a situation vis-a-vis Mexico in 1886, should be recalled:

> The United States, while claiming for aliens within its jurisdiction, and freely conceding to its citizens in other jurisdictions the right of expatriation, has always maintained that the transfer of allegiance must be by a distinctly voluntary act, and that the loss of citizenship cannot be imposed as a penalty nor a new national statute forced as a favor by one Government upon a citizen of another.

U.S. For. Rel., 1886, 723.

> By attaching strings to a naturalization order, they create a body of citizens unable to do, except on penalty, what other citizens may do.
>
> Secondly they undo a judicial determination without the benefit of court action. . . . Judgments in nat- [fol. 73] uralization should [like other court decrees] be vested with finality. If fraud in obtaining naturalization is suspected, a judicial proceeding to set aside the judgment is necessary. The loss of naturalized citizenship by reason of mere residence abroad should not result from legislative fiat.

"Whom We Shall Welcome," Report of the President's Commission on Immigration and Naturaliaztion 239-40 (1953). I do not say, however, that denationalization under Section 352(a)(1) is punishment; it does not appear that Congress intended by this Section to effect "retribution and deterrence," though the provision points in that direction.[6]

Another aspect of the problem is noted preliminarily to enlargement upon the view that the statute violates the Fifth Amendment in its discrimination against naturalized citizens, the chief basis for my dissent. It is by no means clear that deprivation of citizenship for foreign residence is a proper exercise of the foreign relations power in the case of this plaintiff, aside from its discriminatory feature. The premise stated by Mr. Justice Frankfurter in *Perez,* [fol. 74] *supra,* to sustain the loss of citizenship where the individual had voted in a foreign election, should not be read as holding that such a power sweeps all before it. Voting has traditionally been considered one way a person indicates his political allegiance. And our earliest statute

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[6] See *Mendoza-Martinez, supra,* 372 U.S. at 168, where some of the indicia of legislative punishment are discussed. Punishment is judicially regarded as the *sine qua non* of a bill of attainder. See *United States* v. *Lovett,* 328 U.S. 303 (1946). And the element of past conduct, or an ex post facto flavor, if it be required, may be lacking for a determination that this Act constitutes such a bill. However that may be, the quality of punishment insofar as the due process of the Fifth Amendment and the rights guaranteed by the Sixth Amendment are concerned, is not entirely absent here.

on denationalization had to do primarily with codifying the ways by which it could be objectively determined that a citizen had exercised his right voluntarily to expatriate himself.[7] It does not follow that any governmental action [fol. 75] connected in some way with foreign relations can be judicially approved notwithstanding the Bill of Rights. And our constitutional authority is not defined by reference to the sovereign powers of other nations. For ours is a limited government, deliberately so designed with certain rights guaranteed against invasion by the Government.

The right to a nationality is a fundamental one. Our Government has approved the provisions to that effect in the Universal Declaration of Human Rights, Art. 15. Of

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[7] In the early days of the country, the United States was the international champion of every individual's right to expatriate himself. In 1868, Congress declared by statute that the right of expatriation is a natural and inherent right of all people. We were then welcoming and seeking immigrants from the Old World and the refusal of European rulers to recognize American naturalization of its former subjects was a matter of concern to us.

But although the United States recognized and espoused the inherent right of all persons to expatriate themselves, our own laws were silent as to what actions by our citizenry would result in voluntary expatriation or involuntary forfeiture of citizenship. The courts and administrative officers solved such issues as they arose. In 1907, Congress declared that any American citizen shall be deemed to have expatriated himself when he has been naturalized in a foreign state or has taken an oath of allegiance to any foreign state. Except for statutes providing for loss of the rights of citizenship in time of war by deserters or draft evaders, the law remained unchanged until the enactment of the Nationality Act of 1940.

"Whom We Shall Admit," *supra*, at 242. The President's Commission in conclusion recommended that only a presumption of loss of citizenship should be created by a three year residence in the land of one's birth. *Id.* at 240. Interestingly enough the courts under the 1907 statute took the view that the presumption related to loss of diplomatic protection and not citizenship itself, a view which has been credited to Attorney General Wickersham in an opinion of 1910. *Nationality Laws of the United States*, *supra*, at 70.

course under principles of international law a state may decide for itself what criteria must be met in order that citizenship may be achieved. See *United States* v. *Schwimmer*, 279 U.S. 644 (1929); *Briggs, The Law of Nations* 459-62 (1952). And the United States is not bound by a treaty on the subject. A Covenant was to follow the Declaration of Human Rights but has not been entered into. Nevertheless it will no doubt be generally acknowledged that persons may not arbitrarily be deprived of their nationality, an attribute essential to the full possession of personal dignity. Especially is this so when statelessness results from denationalization.

> In recent times statelessness has become a serious problem. It is an anomaly in the international legal order. A stateless person does not enjoy the protection of any state and is often excluded from any rights and privileges in the state where he resides.

"The Universal Declaration of Human Rights, A Standard [fol. 76] of Achievement" 8 (U.N. Publ. No. 62.1.9, 2d ed.). See also the Court's opinion in *Mendoza-Martinez, supra*, 372 U.S. at 160-61.[8] The accepted idea in our nation in the 19th Century that a person may flee one country and cleave to another—if he chooses—is a long way from the notion that a citizen who leaves this country to take up for a term of years residence in a country with which he has had past association has thereby (a) manifested an intention to assume another nationality, or (b) indicated a desire to be rid of the responsibilities of American citizenship, or (c) assumed a status so awkward for the United States Government that his intentions are not relevant and national policy requires the general severance of the ties of citizenship of all those coming within the category described in Section 352(a)(1). The first two alternatives are obviously arbitrary in the absence of a determination

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[8] Earlier legislation seems to reflect these principles. See note 7, *supra*.

on a case by case basis, and the third, which more nearly represents the position of the Government, would seem to call for justification under the foreign relations power by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived.

In the end, however, the basis for my dissent is that the statute is violative of due process of law in that it un-
[fol. 77] fairly discriminates against the naturalized citizen. Due process requires the "equal protection of the laws," terms appearing in the Fourteenth Amendment applicable to the states, but applicable also the Federal Government by reason of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The provision for termination of the nationality of a naturalized citizen because of three years continuous residence in the territory of a foreign state of which he was formerly a national, or in which his birthplace is situated, cannot apply to a native-born citizen. By definition the latter does not acquire his citizenship by naturalization. The inequality in treatment is apparent. The statute as applied to plaintiff imposes upon her the serious consequence of loss of nationality due to foreign residence whereas a national born on American soil may reside abroad indefinitely, and for any reason, without such loss.*

[fol. 78] The Constitution, however, does not require the law to treat all persons alike. Differences due to reasonable classifications may be valid. This has been recognized with respect to age, sex, occupation, and other factors. The question remains, however, whether this principle can justify taking away the nationality of one national for reasons not made applicable to another national, and, if so, whether

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* We note the special demand made on a person who acquires a dual nationality at birth—by place of birth or by parentage—and who after age 22 resides in the state other than the United States for three years. Under certain conditions he must take an oath of allegiance to the United States during the period of three years. 8 U.S.C. §1482. *Cf. Mandoli* v. *Acheson*, 344 U.S. 133 (1952).

the basis asserted for doing so justifies such a severe inequality imposed by law.

The present classification is not based on voting in a foreign political election, as in *Perez*, or on taking an oath of allegiance to a foreign state, as in *Savorgnan*. It is based on place of birth and residence. The inequality in treatment arises after American nationality has been conferred. This is contrary to the general policy of our laws to maintain equality in the status of citizens. A difference which antedates naturalization may not readily be revived after citizenship is acquired and by such revival create a more vulnerable type of citizenship than is possessed by the native-born. Whatever exceptions might be recognized the decided trend of law is to consider the naturalized citizen like the native-born. There is the exception that the President must be native-born because in this respect the Constitution adopted at the beginning of the Republic so provides. [fol. 79] Let us assume, however, that Congress has authority to draw distinctions between the native-born and the naturalized and to classify for some difference in treatment the naturalized citizen who leaves the United States to live in the country of his birth. Let us assume, in other words, that there is a reasonable basis for Congress to conclude that such a person is more likely than the native-born to embarrass the United States in the conduct of foreign affairs, though both live in the same foreign state for the same length of time and one bears no greater allegiance to the United States than the other. Whether a law under which only the naturalized national entirely loses his nationality by such residence is consistent with due process of law requires a decision whether the adoption of such severe inequality of treatment as a means to the end sought by Congress in decreeing it is reasonable in a legal sense when all its consequences are considered. See Mr. Justice Stewart's dissent in *Mendoza-Martinez*, in which Mr. Justice White concurred, 372 U.S. at 214, where it is said in reference to *Trop* that it was there emphasized "that the harshness of denationalization for conduct so potentially equivocal was 'an important consideration where the asserted

power to expatriate has only a slight or tenuous relation to [fol. 80] the granted power' " quoting the concurring opinion of Mr. Justice Brennan in *Trop*, 356 U.S. at 110.

As to the harshness of the deprivation and its consequent inequality we need not dwell upon the many references in Supreme Court opinions to the preciousness of American nationality, and the cruel and unusual character of a law which terminates it. Moreover, in the present case, there is a complete absence of conduct hurtful to the United States in plaintiff living with her husband at the place of his work and residence in a foreign state.[10] That the place is also in the state of her birth is fortuitous. She did not seek to live there, but rather as a young American she met and married a man who makes his living there. She is not a draft evader or a deserter or one who votes in a foreign political election or swears allegiance to a foreign state. Yet she is put to the choice of abandoning either her husband or her nationality. No comparable choice is required of a national born on American soil who lives abroad in like circumstances.

[fol. 81] It is not suggested that she has been a source of embarrassment in the conduct of our foreign affairs; the statute covers her situation because it applies across the board, as it were, to all foreign born. On the other hand a national born in America may safely carry his nationality abroad without fear of losing it even if his presence proves diplomatically embarrassing in the extreme—provided of course he does not engage in conduct specifically proscribed, such as voting in a foreign political election.[11] A total loss of nationality occurs in the case of one with no

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[10] In this regard the majority opinion seems to take a different view: "But these sentiments [of wishing to remain an American], however sincere, were not conducive to her retention of residence in the United States." But Congress has not indicated in the legislation under consideration that its purpose was to keep Americans at home, but rather to promote the smooth working of our foreign relations. Furthermore, we must not confuse the problem in this case with the problem of fraudulent acquisition of citizenship, separately dealt with under the 1940 legislation.

[11] But see note 9, *supra*.

deprivation at all in the case of the other. An inequality of treatment of so severe a character, made on an uncertain basis for any actual difference in the effect of residence of one in comparison with residence of the other on the conduct of foreign affairs, does not meet the test of reasonableness in the means adopted for accomplishing the legislative purpose. A reasonable classification for some purposes does not justify the law in imposing an inequality among citizens out of proportion to the purpose for which the classification is made. See, again, *Trop*, 356 U.S. at 110 and 114 (concurring opinion), and our reference above to the dissenting opinion of Mr. Justice Stewart in *Mendoza-*[fol. 82] *Martinez*. Though I assume denationalization in plaintiff's case possibly would tend to avoid some possible embarrassment in the conduct of foreign affairs it is not shown that the embarrassment would be either certain or substantial, and in any event the assumption that denationalization avoids some embarrassment incident to residence abroad applies to the native-born as well as to the naturalized national.[12] See *Worthy* v. *Herter*, 106 U.S. App. D.C. 918, 270 F.2d 905 (1959), *cert. denied*, 361 U.S. 918 (1959). The difference in degree of embarrassment, if any, is not shown to be substantial enough to warrant so great a difference in the consequence meted out only to the naturalized citizen. Constitutional power should not be overextended so as to deprive plaintiff of a fundamental liberty upon so tenuous a basis.

Perhaps the matter can be stated more simply. The Supreme Court has held in the case of a convicted deserter that denationalization is a punishment so cruel and unusual as to violate the Eighth Amendment. The Court has also held in the case of one who leaves and remains outside the jurisdiction of the United States in time of war for the purpose of evading military service that denationalization is a punishment which, if to be upheld at all, must be [fol. 83] accompanied by the safeguards of procedural due process of law. It would seem necessarily to follow from these decisions that in the case of the plaintiff dena-

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[12] See notes 4 and 5, *supra*.

tionalization, which is just as severe as in the two cases referred to, would create such a serious inequality among Americans upon so tenuous a basis that it fails the test of reasonableness which substantive due process requires of all legislation, especially that which restricts the liberty of the citizen.[12] What is cruel and unusual under the Eighth Amendment for the deserter *a fortiori* is unreasonable in its solitary application to a naturalized citizen under the Due Process Clause of the Fifth Amendment. Indeed, were there no Eighth Amendment it is probable the conclusion reached in *Trop* and *Mendoza-Martinez* would rest equally well upon the Due Process Clause alone.

I would grant plaintiff's motion for summary judgment.

Charles Fahy, Circuit Judge.

[fol. 84]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, Plaintiff,

v.

DEAN RUSK, individually and as Secretary of State, Defendant.

JUDGMENT—June 7, 1963

This cause having come before the Court on Plaintiff's motion for summary judgment, and defendant's motion for judgment on the pleadings; counsel having been heard; the Court having considered the record and entered its memorandum opinions in the case on May 21, 1963,

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[12] We are not concerned here with the greater latitude by which the reasonableness of legislation concerning economic problems is to be judged, but with the stricter test applicable to a deprivation of personal liberty.

It is this 7th day of June, 1963,

Ordered, Adjudged and Decreed:

(1) That defendant's motion for judgment on the pleadings be, and the same hereby is, granted; and

(2) That plaintiff's motion for summary judgment be, and the same hereby is, denied, and her action is hereby dismissed.

Burnita Shelton Matthews, United States District Judge.
Richmond B. Keech, United States District Judge.

I dissent:

Charles Fahy, Circuit Judge.

[fol. 85] Certificate of Service (omitted in printing).

[fol. 86] [File endorsement omitted]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 27, 1963

I. Notice is hereby given that Angelika L. Schneider, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the judgment and order, entered in this action on June 10, 1963, granting defendant's motion for judgment on the pleadings, denying plaintiff's motion for summary judgment, and dismissing this action.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said

transcript the entire record of this action, including this notice of appeal.

III. The following questions are presented by this appeal:

[fol. 87] 1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived petitioner of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to adverse consequences as a naturalized citizen which are not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the petitioner.

4. Whether Section 352(a)(1) is unconstitutional because it imposes punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.

Milton V. Freeman, Werner J. Kronstein.

Robert E. Herzstein, 1229—19th Street, N.W., Washington, D. C., Attorney for Angelika L. Schneider.

[fol. 88] Certificate of Service (omitted in printing).

[fol. 89]

SUPREME COURT OF THE UNITED STATES

No. 368, October Term, 1963

ANGELIKA L. SCHNEIDER, Appellant,

vs.

DEAN RUSK, Individually, and as Secretary of State

ORDER NOTING PROBABLE JURISDICTION—October 28, 1963

Appeal from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument immediately following No. 253.

October 28, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually, and as Secretary of State, *Appellee*.

JURISDICTIONAL STATEMENT

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AUGUST 13, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually, and as Secretary of State,
Appellee.

JURISDICTIONAL STATEMENT

Appellant Angelika L. Schneider appeals from a final judgment of the United States District Court for the District of Columbia. This appeal challenges the constitutionality of Section 352(a)(1) of the Immigration and Nationality Act of 1952.

OPINION BELOW

The majority opinion of the three-judge District Court and the dissenting opinion of Circuit Judge Fahy, entered on May 21, 1963, appear at Appendix A hereto.

JURISDICTION

Appellant brought this action for an injunction and declaratory judgment pursuant to Sections 11-305 and 11-306 of the District of Columbia Code; 28 U.S.C. §§ 2201, 2202, and 2282; and 5 U.S.C. § 1009.

After proceedings in the District Court and the Court of Appeals this Court granted certiorari, 371 U.S. 858 (1962). In a *per curiam* opinion entered February 18, 1963, 372 U.S. 224, this Court vacated the judgments below and remanded the case for trial before a three-judge District Court pursuant to 28 U.S.C. §§ 2282, 2284.

On June 10, 1963 the three-judge District Court, one judge dissenting, entered a judgment (Appendix B) granting appellee's motion for judgment on the pleadings, denying appellant's motion for a summary judgment of injunction, and dismissing the action. A notice of appeal was filed in the District Court on June 27, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived appellant of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to adverse consequences as a naturalized citizen which are not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the appellant.

4. Whether Section 352(a)(1) is unconstitutional because it imposes punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.

STATUTE INVOLVED

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads, in pertinent part, as follows:

> Loss of nationality by naturalized national
>
> (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in Section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> (2) having a continuous residence for five years in any foreign state or states, except as provided in Sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.

STATEMENT OF THE CASE.

Appellant was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family.

Appellant lived in the United States continuously thereafter. She received grade school and high school education in or near New York City and entered Smith College in Northampton, Massachusetts in 1950. On December 4, 1950, while a freshman at Smith College, appellant became a citizen of the United States by derivative naturalization, through the naturalization of her mother. On graduation from Smith College in 1954 appellant received a scholarship from the Institute of International Relations in New York, under which she studied for a year in Switzerland. She then continued her studies for a year in Paris, returning to the United States in April 1956.

On June 6, 1956, appellant left the United States to marry Dr. Dieter Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom she had become engaged while studying in Paris. After that time, she lived continuously with her husband in the Federal Republic of Germany, for a period of more than three years, except for one six-week family visit to the United States, in September and October of 1957.

The two sons born to appellant, one in 1957 and the other in 1958, were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate.

During all the time of her residence in Germany until June 1959, appellant was in possession of a valid United States passport. In June 1959, however, the United States Consulate in Dusseldorf refused to grant her an extension of her passport contending that she had lost her United States citizenship. In September 1959, appellant was requested by the American Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, she was served with a "Certificate of Loss of Nationality of the United States."

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed by letter of January 20, 1960, the previous administrative decision that appellant had lost her citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952. This action was, under the regulation, the "final administrative determination" of the State Department, leaving appellant without further administrative remedy. Pursuant to this ruling appellant is now being denied all rights and privileges of United States citizenship, including a United States passport.

Appellant is now residing in the Federal Republic of Germany. The authorities in Germany have given her a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time. Appellant feels herself to be an American and insists on her status as an American citizen. She is not a German citizen, nor a citizen of any other country. She is residing in Germany only because that is where her husband lives and practices his profession.

THE HISTORY OF THESE PROCEEDINGS

On February 1, 1960, appellant filed a complaint in the District Court for the District of Columbia alleging that Section 352(a)(1) of the Immigration and Nationality Act of 1952, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States. She sought an injunction against the enforcement of Section 352(a)(1), a declaration that she is a citizen of the United States, and certain other relief.

On April 15, 1960, appellant applied for the convening of a three-judge District Court. This application was denied by the District Court on June 19, 1960.

On August 17, 1960, a single judge of the District Court entered an order denying appellant's motion for summary judgment, granting appellee's motion for judgment on the pleadings, and dismissing the complaint. The Order and Judgment of the District Court recited that "Section 352(a)(1) of the Immigration and Nationality Act of 1952 is not repugnant to the Constitution of the United States."

Appellant took a timely appeal to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals, on May 11, 1962,[1] affirmed the

[1] The time lapse between the judgments of the District Court and the Court of Appeals is accounted for as follows:

On March 24, 1961, after the case had been briefed and argued in the Court of Appeals, that court *sua sponte* postponed its decision pending this Court's decision in *Herter* v. *Cort*, No. 567, October Term 1960 (*Rusk* v. *Cort*, No. 20, October Term 1961; renumbered No. 3 October Term 1962). On April 25, 1961, the Court of Appeals denied a motion by appellant asking the court either to decide the matter promptly or certify it to this Court. On May 12, 1961, appellant petitioned this Court for a writ of certiorari before judgment. The writ was denied on June 19, 1961, 366 U.S. 963.

judgment of the District Court "on the authority of *Lapides* v. *Clark*, 85 U.S. App. D. C. 101, 176 F. 2d 619 (1949)."

A writ of certiorari was granted by this Court on October 15, 1962, 371 U.S. 858. On February 18, 1963, before oral argument had been presented, this Court by *per curiam* opinion, vacated the judgments of the courts below and remanded the case to the District Court for trial before a three-judge court, on the ground that the constitutional questions presented were "not plainly insubstantial" and the District Court erred in denying appellant's original application for the convening of a three-judge court.

A three-judge District Court was convened and a hearing was held on April 1, 1963. The judgment of the District Court from which this appeal is taken was entered on June 10, 1963, Judge Fahy dissenting. Notice of appeal was filed June 27, 1963.

THE QUESTIONS ARE SUBSTANTIAL

For the following reasons, appellant contends that the questions presented are so substantial that plenary consideration by this Court, with briefs on the merits and oral argument, is required for their resolution:

I. The Prior History of This Case Establishes That the Questions Are Substantial.

This case is before this Court for the second time. The importance and substantiality of the questions presented here was first recognized by this Court when it granted certiorari in October 1962. At that time the Government stated in its Memorandum in response to the petition for certiorari that

> "The issues in this case are . . . of considerable importance both to the United States and to its naturalized citizens. . . . [B]ecause of the impor-

tance of the issues presented [the Government] . . . does not object to the granting of a writ of certiorari."

Further, this Court in its *per curiam* opinion of February 18, 1963, directing remand for trial before a three-judge court, stated:

"[W]e disagree with the conclusion of the courts below as to the substantiality of [the constitutional issue in this case]. . . . The . . . decisions of this Court in *Perez* v. *Brownell,* 356 U.S. 44 and *Trop* v. *Dulles,* 356 U.S. 86, reveal that the constitutional questions involving deprivation of nationality which were presented to the district judge were not plainly insubstantial."

Finally, the fact that the decision below was by a divided court and that so distinguished a judge as Judge Fahy filed a long and detailed dissenting opinion supporting the view that the challenged statute is unconstitutional is further evidence that the questions presented on this appeal are substantial.

2. The Questions Are Important and They Have Not Been Resolved by This Court.

As noted above, the Government's Memorandum submitted to this Court in the earlier phase of this case stated that the issues are important both to the United States and to its naturalized citizens. The Memorandum pointed out that during a recent twelve-month period the State Department made 1,065 determinations of loss of nationality under Section 352(a)(1).[2] In ad-

[2] It was also pointed out that 179 such determinations were made during that period under Section 352(a)(2) which provides for denationalization where a naturalized citizen resides abroad for five years, irrespective of the country of residence. The total of 1,244 determinations under Section 352 resulted from 12,547 administrative adjudications.

dition, information obtained from the State Department Passport Office shows that there are at present over 670,000 Americans, excluding military personnel, who reside abroad throughout the world. Although there are no statistics available as to how many of these are naturalized, it is to some extent indicative that of the some 857,000 United States passports issued during 1961, about 105,000 were issued to naturalized citizens. In view of the practical impact a decision of this Court in this case can have on the lives of thousands of American citizens, it is imperative that the important questions presented here be resolved.

(a) The question whether any substantive discrimination between naturalized and native-born citizens is permissible by our Constitution has never been resolved by this Court. Section 352 represents the first attempt by Congress to impose such a discrimination, and its constitutionality has never been passed upon by this Court.

(b) The question whether Congress, under its foreign affairs power, can attach loss of citizenship to an act which is completely consistent with continued allegiance to the United States—such as residence abroad—was left unresolved in this Court's decisions in *Perez* v. *Brownell*, 356 U.S. 44 (1958), *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), and *Rusk* v. *Cort*, 372 U.S. 144 (1963). In *Perez* this Court in upholding the constitutionality of withdrawing the citizenship of those who voted in foreign elections noted (356 U.S. at 60):

> "... Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance

> to another country in some measure, at least, inconsistent with American citizenship."

Furthermore, as Mr. Justice Stewart stated in his dissenting opinion in *Mendoza* and *Cort*:

> "This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country."

372 U. S. at 214.

(c) The question whether the automatic expatriation of a naturalized citizen who resides abroad for a certain period is essentially a punishment has never been decided by this Court. This Court made it clear in *Trop* v. *Dulles*, 356 U.S. 86 (1958) that imposing expatriation as a penalty constitutes cruel and unusual punishment, and *Mendoza* and *Cort* hold that, in any case, such punishment cannot be imposed without observing the procedural requirements of the Fifth and Sixth Amendments.

3. The Section Is Prima Facie Invalid.

A. Section 352(a)(1) of the Immigration and Nationality Act of 1952 applies only to naturalized citizens. There is no restriction on the right of the native-born citizen to travel or reside abroad as long or for whatever legitimate purpose he may desire. This section would mark the *first* and *only* substantive discrimination between native-born and naturalized citizens with the single exception of the Constitutional provision limiting the Presidency of the United States to the native-born. It is an abrupt deviation from the long-established principle that native-born and naturalized citizens are equal under the law and that Con-

gress may not abridge this equality. See, for example, *Luria* v. *United States*, 231 U.S. 9 (1913); *Osborn* v. *The National Bank of the United States*, 22 U.S. 738 (1824), and the Fourteenth Amendment to the Constitution, which provides for the citizenship of "All persons *born* or *naturalized* in the United States." (Emphasis added).

B. The challenged legislation, therefore, cannot be sustained on the theory that Congress may impose a different or higher standard of behavior on naturalized citizens than it does on the native-born or may condition the grant of citizenship on the future performance of duties and obligations not imposed on citizens generally. If the statute were upheld on the theory that naturalized citizens are in effect citizens on probation subject to special regulations, then naturalized citizens would plainly be relegated to a second-class citizen status—contrary to the plain meaning and the spirit of the Constitution.

C. The Section cannot be justified as an attempt to deal with the problem of citizenship obtained fraudulently or without a bona fide intention at the time of naturalization to remain in the U.S. The three-year period of foreign residence is an absolute bar without relation to time or circumstances. It operates no matter how long after the naturalization foreign residence is taken up and irrespective of the fact that the reasons for taking up foreign residence may have been unforeseeable.

The present case presents a clear example. The Government has not suggested, nor could it suggest, any question of bad faith in petitioner's naturalization, for it is plain that when Angelika Schaffer became naturalized in 1950 at the age of 16, having resided in the United States since 1939, she could not possibly

have known or suspected that she would, years later, meet Dieter Schneider, marry him, and live with him in his home country. Yet the statute seeks to take away citizenship acquired in good faith, on the basis of events not contemplated or foreseeable. If sought to be sustained as creating a presumption reflecting on the validity of the original naturalization, it would clearly be arbitrary. Cf. *Tot* v. *United States*, 319 U.S. 463 (1943); *Heiner* v. *Donnan*, 285 U.S. 312 (1932).

D. The discriminatory treatment of naturalized citizens in Section 352(a)(1) bears no reasonable relation to the regulation of foreign affairs. In *Perez* v. *Brownell, supra*, this Court said:

> "Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs." (356 U.S. at 58).

The requisite "rational nexus" does not exist in Section 352(a)(1) because that section reaches far beyond what is necessary to insure against any embarrassment in the conduct of foreign affairs that might be caused by the foreign residence of a naturalized citizen.

The mere residence abroad of a naturalized citizen, as that of a native-born citizen, is in itself a neutral act devoid of political implications. As Circuit Judge Fahy pointed out in his dissenting opinion below, it is not at all clear that embarrassment resulting from the residence abroad of naturalized citizens "would be either certain or substantial." If in particular circumstances or areas, the residence abroad of natural-

ized Americans may be likely to complicate our relation with a foreign government, Congress could have fashioned legislation aimed more precisely at these circumstances without broadly imposing the harsh sanction of expatriation irrespective of the circumstances. *Cf. Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951). Instead Congress laid down a blanket rule limiting the right of naturalized citizens to travel and live abroad irrespective of whether any foreign affairs problem is likely to result. As Mr. Justice Stewart pointed out in his recent dissent in *Mendoza* and *Cort,* quoting Mr. Justice Brennan's opinion in *Trop,* in determining whether a rational nexus exists:

> "The harshness of denationalization for conduct so potentially equivocal [is] 'an important consideration where the asserted power to expatriate has only a slight or tenuous relationship to the granted power.'"

Clearly, that nexus is absent here.

E. Finally, since mere residence abroad is not an act itself inconsistent with allegiance to the United States and since no rational nexus exists between the sanction of Section 352(a)(1) and any power of Congress, the section must be considered to impose punishment. The tacit assumption upon which Section 352(a)(1) is based is that naturalized citizens should reside in the United States.[3] The depatriation pro-

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[3] Compare the following language of the majority opinion of the court below (see Appendix A, p. 24a):

> "Finally, the plaintiff insists that she is an American by training, in thought and in feeling, and that she values highly her American citizenship. But these sentiments, however sincere, *were not conducive to her retention of residence in the United States.*" (Emphasis added)

vision of Section 352(a)(1) is the sanction that is designed to deter naturalized citizens from residing abroad. It is clear under *Trop* v. *Dulles, supra*, that imposing depatriation as a sanction in such a case constitutes cruel and unusual punishment.

Furthermore, under *Mendoza* and *Cort*, it is clear that such punishment, whether or not cruel and unusual, cannot be imposed without observing the procedural safeguards of the Fifth and Sixth Amendments.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted and this case should be given plenary consideration by this Court, with briefs on the merits and oral argument.

Respectfully submitted,

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AUGUST 13, 1963

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

May 21, 1963

ANGELIKA L. SCHNEIDER, *Plaintiff*,

vs.

DEAN RUSK, individually and as Secretary of State, *Defendant*.

Opinion

Milton V. Freeman, Werner J. Kronstein, and Robert E. Herzstein of Washington, D. C.; Horst Kurnik of New York, N. Y.; Charles A. Reich of New Haven, Conn.; and Arnold, Fortas & Porter of Washington, D. C., for plaintiff.

Archibald Cox, Solicitor General, Herbert J. Miller, Jr., Assistant Attorney General, J. William Doolittle, Assistant to the Solicitor General, Beatrice Rosenberg, J. F. Bishop, Attorneys, Department of Justice, Washington, D. C., for defendant.

Jack Wasserman, David Carliner, and Melvin L. Wulf of Washington, D. C., for American Civil Liberties Union as *amicus curiae*.

Before FAHY, Circuit Judge, and KEECH and MATTHEWS, District Judges.

MATTHEWS, District Judge.

The plaintiff, a national of Germany at birth who became in 1950 a naturalized citizen of the United States, has been declared to have lost her American citizenship by reason of residing continuously in the foreign country of her origin for three years. The issue she raises before the court is whether this divesture [*sic*] of citizenship ac-

cords with the Constitution. The statute[1] relied upon by the Government to effect the expatriation of plaintiff, hereafter referred to as Section 352(a)(1), reads in pertinent part:

> "(a) A person who has become a national by naturalization shall lose his nationality by—
>
> "(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . ."

Residence as the term is used in Section 352(a)(1) is defined as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections . . . and 352 . . . where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state . . ."[2]

In February 1960, plaintiff brought this suit for a judgment declaring her to be a citizen of the United States and enjoining the enforcement of Section 352(a)(1) by the Secretary of State. She moved for the convening of a three-judge court pursuant to 28 U.S.C. 2282 and 2284 to try the case. The District Court concluded that plaintiff's complaint presented no substantial constitutional issue and denied her motion to convene a three-judge court, relying on *Lapides* v. *Clark*, 176 F.2d 619, cert. denied, 338 U.S. 860, rehearing denied, 338 U.S. 888, in which the Court of Appeals for the District of Columbia Circuit had directly

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[1] Section 352(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1484(a)(1), successor and counterpart to Sec. 404(b) of the Nationality Act of 1940, 54 Stat. 1137 at page 1170.

[2] Section 101(a)(33) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(33).

upheld the predecessor of a companion provision[3] which deprived the naturalized American of citizenship for continuous residence for five years in any foreign state.

Thereafter, the court granted a motion of the defendant Secretary of State for judgment on the pleadings and on the basis of *Lapides* the Court of Appeals affirmed. But the Supreme Court vacated these judgments, stating in a *per curiam* opinion that its intervening decisions in *Perez* v. *Brownell*, 356 U.S. 44, and *Trop* v. *Dulles*, 356 U.S. 86, reveal that the constitutional questions involving deprivation of nationality which were presented to the district judge were not plainly insubstantial, and the case was remanded to the District Court for hearing on its merits by a three-judge court. *Schneider* v. *Rusk*, 372 U.S. 224. Accordingly, this three-judge court has been convened, and the matters before the court are the motion of the plaintiff for summary judgment and that of the defendant for judgment on the pleadings.

The facts are not in dispute. The plaintiff was born in 1934 in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany, and in 1939 came to the United States with her family. In 1950 she became a naturalized citizen of the United States through the naturalization of her mother. She lived in the United States from 1939 to 1954. During 1954 and 1955 she studied at a University in Switzerland and in the following year was a full-time student at the Sorbonne in Paris. Returning to the United States in April 1956, she was employed in New York for a few months and on June 6, 1956 left for Germany where she married a German national on July 4, 1956. Since that time plaintiff has lived continuously with her husband in Germany for a period of more than three years except for one visit of six weeks to relatives in the

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[3] Section 404(c) of the Nationality Act of 1940, 54 Stat. 1137 at page 1170, now Section 352(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1484(a)(2).

United States in 1957. She intends to continue to live in Germany and has no definite intention to return to the United States to reside. In June 1959 the United States Consulate at Dusseldorf refused to grant an extension of the plaintiff's United States passport, contending that she had lost her American citizenship. The plaintiff was requested by the American Consulate in September 1959 to surrender her naturalization certificate which she did under protest. On November 25, 1959, the plaintiff was given a "Certificate of the Loss of the Nationality of the United States." The Board of Review on the Loss of Nationality in the State Department in Washington affirmed the previous administrative decision that plaintiff had expatriated herself pursuant to Section 352(a)(1). This action on January 20, 1960 was the final administrative determination of the State Department.

The plaintiff is now stateless, the provisions of the German Nationality Act imposing German nationality upon a woman marrying a German national having been repealed.[4] But upon her application plaintiff may easily resume German citizenship because of her husband's German nationality.[5] She has not done so because of her desire to retain United States citizenship. Two sons born in Germany of her marriage, one in 1957 and the other in 1958, have been registered with the United States Consulate as citizens of the United States but they are also German nationals.[6] Moreover, each child is subject to loss of his American citizenship if he fails to meet the requirement of continuous physical presence in the United States for at least five years following his attainment of the age of fourteen

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[4] Laws Concerning Nationality, U.N.Doc. No. ST/LEG/SER.B/4, p. 179, Sec. 6 & note 4 on pp. 178-179, also p. 187.

[5] Brief For Petitioner in the Supreme Court of the United States, Oct. Term 1962, No. 251, pp. 38, Note 15.

[6] Laws Concerning Nationality, U.N.Doc. No. ST/LEG/SER.B/4, p. 179, Sec. 4.

years and previous to his arrival at the age of twenty-eight years.[7]

In challenging Section 352(a)(1) plaintiff contends that it bears no reasonable relationship to any power granted to Congress and therefore is outside the bounds of the Constitution. She maintains that she cannot validly be expatriated against her will and that her American citizenship remains intact, despite her continuous residence for three years in the foreign country of her origin. She also argues that since native-born citizens are not divested of their American nationality for prolonged residence abroad, Section 352(a)(1) discriminates against naturalized citizens and thus denies them liberty and due process of law, contrary to the Fifth Amendment. A further contention of plaintiff is that her purported deprivation of citizenship constitutes cruel and unusual punishment in contravention of the Eighth Amendment to the Constitution.

From the historical evolution of the legislation in question it appears that Congress was attempting to exercise its power to regulate foreign affairs when it decreed that continuous residence for three years by a naturalized citizen in the country of his origin should result in expatriation. While the Constitution contains no specific grant to Congress of power to legislate for the effective regulation of foreign affairs, "there can be no doubt of the existence of this power in the law-making organ of the Nation." *Perez* v. *Brownell*, 356 U.S. 44. As was there said at page 57:

> "The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign

[7] 8 U.S.C. 1401(b). See also 8 U.S.C. 1482 regarding dual nationals.

nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests."

Prior to the Nationality Act of 1907 Congress had not defined by statute or otherwise what may constitute expatriation, and the Department of State was forced to look elsewhere for an enumeration of the acts which might have that effect.[8] The policy of the United States varied as to the assistance and protection which it would afford naturalized citizens who returned to their native land. The many executive utterances on this subject throughout the 19th Century show the magnitude of the problem.[9] It is clear that even prior to 1907 the State Department considered in many instances that a naturalized citizen who returned to his native land for a protracted period had expatriated himself or forfeited the protection of this Government, especially if he manifested no intention of returning to the United States.[10]

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[8] Fish to Washburne, June 28, 1873, 3 Moore, Digest of International Law (1906), 712; President Grant, annual message, Dec. 1, 1873, *id.*, at pp. 712-13; *Perez* v. *Brownell*, 256 U.S. 44, at page 49.

[9] 3 Moore, Digest of International Law, pp. 562-715, 735-757, 766-771.

[10] E.g., Smith to Hance, Jan. 21, 1867, 3 Moore, Digest of International Law at p. 737; Frelinghuysen to Herdocia, Dec. 8, 1882, *id.* at p. 739; Davis to Barnett, Aug. 20, 1884, *ibid;* Bayard to Lee, July 24, 1886, *id.* at pp. 740-741; Rives to Proios, Oct. 25, 1888, *id.* at pp. 741-742; Gresham to Terrell, Aug. 27, 1894, *id.* at p. 743; Adee to Little, July 13, 1895, *ibid;* Fish to Hall, May 3, 1869, *id.* at p. 766; Williams, At.-Gen., Aug. 20, 1873, *id.* at p. 768; Frelinghuysen to Lowell, Feb. 27, 1884, *ibid;* Porter to Curry, Jan. 4, 1886 *id.* at p. 768-769; Porter to Meyer, June 30, 1887, *id.* at p. 769; Uhl to Willis, May 14, 1895, *id.* at p. 770; and see also *id.* at pp. 947-950, and 952-966.

The rationale for this policy was set forth in a Circular[11] of March 27, 1899, issued by Mr. Hay, Secretary of State, to United States diplomats and consular officers, as follows:

> "This Government does not discriminate between native-born and naturalized citizens in according them protection while they are abroad . . . But in determining the question of conservation of American citizenship and the right to receive a passport, it is only reasonable to take into account the purpose for which the citizenship is obtained. A naturalized citizen who returns to the country of his origin and there resides without any tangible manifestation of an intention to return to the United States may . . . generally be assumed to have lost the right to receive the protection of the United States. His naturalization in the United States can not be used as a cloak to protect him from obligations to the country of his origin while he performs none of the duties of citizenship to the country which naturalized him. The statements of loyalty to this Government which he may make are contradicted by the circumstance of his residence, and are open to the suspicion of being influenced by the advantages he derives by avoiding the performance of the duties of citizenship to any country. It is not to be understood by this that naturalized American citizens returning to the country of their origin are to be refused the protection of a passport. On the contrary, full protection should be accorded to them, until they manifest an effectual abandonment of their residence and domicile in the United States."

Until 1868 there was doubt as to how far the doctrine of perpetual allegiance derived from our former colonial relations with Great Britain was applicable to American citizens. In that year Congress swept away these doubts by decreeing that it is "a natural and inherent right of all people" to divest themselves of allegiance to any state, 15 Stat. 223, § 1999, being motivated, at least in part, by

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[11] 3 Moore, Digest of International Law, p. 950.

the refusal of England and other nations to recognize the right in naturalized Americans to cast off their former allegiance. This legislation has been applied to the divestment by native-born and naturalized Americans of their United States citizenship. But Congress did not in this law indicate what acts were to be deemed to work expatriation.

At about this same time the United States negotiated a naturalization treaty with the North German Confederation by which each country agreed to recognize the naturalization of its own natives by the other. This treaty further provided that if a German naturalized in America renewed his residence in North Germany, without the intent to return to America he would be held to have renounced his naturalization in the United States and that the intent not to return could be held to exist when the person naturalized in the one country resided more than two years in the other country. 15 Stat. 615, 616-617. Thereafter the United States concluded similar naturalization treaties with other nations. E.g., 15 Stat. 687, (Mexico), 17 Stat. 941 (Denmark). However, some nations, including a number of important ones, refused to enter into such treaties. E.g., 3 Moore, Digest of International Law, pp. 604-607 (Greece), 609 (Italy), 622 (Russia). Moreover, the treaties themselves required administrative construction. 3 *id.*, pp. 744-757.

Meanwhile, the Executive Department urged Congress to enact further legislation defining the acts by which citizens should be held to have expatriated themselves, especially in view of the problems raised by citizens residing permanently abroad. E.g., Message of President Grant to Congress, Dec. 1, 1873, 6 Messages and Papers of the Presidents, Richardson Ed., 1897, pp. 4193-4194, and Message of President Grant to Congress, Dec. 7, 1874, *id.* at pp. 4245-4246. In his message of December 1, 1873, President Grant pointed out:

"In some cases . . . naturalized citizens of the United States have returned to the land of their birth with intent to remain there, and their children, the issue of a marriage contracted there after their return, and who have never been in the United States, have laid claim to our protection when the lapse of many years had imposed upon them the duty of military service to the only government which had ever known them personally."

In his message of Dec. 7, 1874, President Grant said:

"I have again to call the attention of Congress to the unsatisfactory condition of the existing laws with reference to expatriation and the election of nationality. . . . Congress by the Act of the 27th of July, 1868, asserted the abstract right of expatriation as a fundamental principle of this Government. Notwithstanding such assertion and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least great question. In some cases the provisions of the treaties furnish some guide; in others it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties to use the claims to citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere."

Finally in 1906 a Senate Resolution and a recommendation of the House Committee on Foreign Affairs called for an examination of the problems relating to American citizenship, expatriation, and protection abroad. This led to

the appointment by the Secretary of State of a Citizenship Board composed of the Solicitor of the State Department, the Minister to the Netherlands and the Chief of the Passport Bureau. After a study this Board made a report with recommendations. In its report, H.R. Doc. No. 326, 59th Congress, 2nd Session, the Board noted at pages 25-27 that "Expressed renunciation of American citizenship is . . . extremely rare; but the class of Americans who separate themselves from the United States and live within the jurisdiction of foreign conuntries is becoming larger every year, and the question of their protection causes increasing embarrassment to this Government in its relation with foreign powers"; that immigration "to the United States has of recent years reached proportions hitherto unheard of, and many of these immigrants will become naturalized citizens of the United States"; that "naturalized citizens are more apt to go abroad than native citizens"; that having "already changed their domicile, they are more apt to change it again"; that one reason "why the attempts which have been made in the past to secure a legislative definition of expatriation have failed is undoubtedly because the necessity has been slight in comparison with the necessity which now exists"; that it "is difficult to determine when those who have been absent from the United States for a long time and who give no tangible evidence of an intention of returning should be left without protection"; that when "they are refused they are aware that it is in the discretion of the Executive to accord them protection"; that "they are aware that the policy toward them has not been stable and that one official may grant what another has refused"; that they "do not accept, therefore, a refusal as final, but strain their energies to induce a change of decision, and their cases remain open while their status remains undefined"; and that it "seems to be clear that these people have by their own act worked their own expatriation, and that their status should be put beyond the

uncertainty or fluctuations of executive policy by a declaratory law."

The Board recommended that a law be passed providing among other things that "expatriation of an American citizen may be assumed" when in time of peace, he obtains naturalization in a foreign state, or engages in the service of a foreign state where such service involves the taking of an oath of allegiance to that state, or "becomes domiciled in a foreign state, and such domicil may be assumed when he shall have resided in a foreign state for five years without intent to return to the United States", the presumption of expatriation to be rebuttable. *Id.* at p. 23.

On the basis of this report and recommendations Congress in passing the Nationality Act of 1907, 34 Stat. 1228, provided in Section 2 that when any naturalized citizen had resided for two years in the foreign state from which he came, or for five years in any other foreign state, it would be presumed that he had ceased to be an American citizen, and the place of his general abode would be deemed his place of residence during said years. However, it was further provided that such presumption might be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States under such rules and regulations as the Department of State might prescribe. It was stated in the House by the representative who introduced the measure that the provisions regarding naturalized citizens were designed to discourage people from evading responsibilities both to other countries and to the United States and to save our Government from "becoming involved in any trouble or question with foreign countries where there is no just reason." 41 Cong. Rec. 1463-1464.

However, the provision of the 1907 law regarding expatriation of naturalized citizens did not prove satisfactory. In 1928 Attorney General John G. Sargent de-

scribed it as being "so loosely drawn that its operation and effect have been in doubt ever since its passage." 35 Ops. Attys. Gen. 399, 404. He deemed it "obvious that clarifying legislation is desirable", citing the 1795 decision of the Supreme Court in *Talbot* v. *Jansen*, 3 Dall. 133, 154, in which it is declared that a statute of the United States "relative to expatriation, is much wanted" and besides "ascertaining by positive law the manner in which expatriation may be effected would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point."

At the request of the House Committee on Immigration and Naturalization, 86 Cong. Rec. 11943, President Roosevelt appointed in 1933 a committee composed of the Secretary of State, the Attorney General and the Secretary of Labor to study the existing laws governing nationality, to codify them, and to recommend such changes as might seem desirable. Five years were spent in study and research by specialists representing the three departments. A draft code submitted by this committee contained a provision that a naturalized citizen (unless he came within specified exceptions) should lose his citizenship by residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which his place of birth is situated. Nationality Laws of the United States, 1938, Part 1, House Committee Print, 76 Congress, 1st Sess., p. 69.

The Committee concluded in its report that the existing law had been found "to a considerable extent to be insufficient and unsatisfactory, since, as construed by the courts, the presumption of loss of citizenship arising under its terms never became final, regardless of the length and cause of the foreign residence . . ." *Id.* p. 70. The report further pointed out that

> ". . . before an alien is admitted to the privilege of citizenship, under the law of the United States, he is required to declare under oath that he intends to

reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted.

"The problem presented by naturalized citizens residing, for insufficient reasons, in the foreign states in which they were born or of which they were formerly nationals, of whom there are thousands at the present day, has been a cause of difficulty and embarrassment to the Government of the United States in its efforts to extend protection to other naturalized citizens in meritorious cases."

Consideration was given by the Committee of whether the loss of nationality should be made to result directly from the fact of foreign residence, or should be made dependent upon proceedings in the courts. It was concluded by the committee that the termination of American nationality should be *automatic*, resulting directly from the fact of foreign residence since proceedings in the courts would be cumbersome, long drawn out and expensive to the Government. It was deemed desirable, however, to frame the provision in such a way as to avoid making the termination dependent upon the judgment or discretion of a diplomatic or consular officer or of officers of the Department of State itself or any other branch of the executive. It was thought that the function of these officers should be limited as far as possible to the findings of fact and the application of the statute to each case accordingly. *Id.* at p. 71.

The report of the committee appointed by President Roosevelt further stated that while a provision for loss of nationality in cases of naturalized citizens who reside for three years in their countries of origin may appear to be "somewhat drastic", it was believed to be

"fully warranted by the numerous cases which have been brought to the Department's attention in past years, especially in connection with applications for passports or consular registration, for diplomatic protection, or for the support of claims against the gov-

ernments of such countries. This provision is not in conflict with the position taken by the Government of the United States in past years with regard to the protection of naturalized citizens or with the treaties on that subject to which the United States is, or has been a party . . . On the contrary, it agrees in spirit with the provisions in the naturalization treaties concerning naturalized citizens who return to their countries of origin for permanent or indefinite residence. It is not to the advantage of the United States to attempt to extend diplomatic protection to such persons, who are a distinct liability, rather than an asset, to this country. Moreover (what is quite important), it is believed that a definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalization to conclude such treaties and to recognize the American nationality of the persons concerned when they return to their countries of origin for legitimate objects and for residence of a temporary character." *Id.* at p. 71.

In stating their reasons for support of a provision denationalizing naturalized citizens for prolonged residence in the foreign countries in which they were born or of which they were formerly nationals, the committee named by President Roosevelt, pointed out, *Id.* at page 71, that

"Reports from diplomatic and consular officers show that, in the vast majority of cases of naturalized citizens residing abroad, they have their residence in such foreign states. The number of these cases is very large, and they are a constant source of irritation. Their existence has rendered it difficult to make fully effective the principle, which this Government has long sought to maintain, that naturalization involves a complete change of national character and termination of the prior allegiance . . ."

"Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely,

> their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated. Naturally, in these cases, identification with the native population is much more likely to occur than in the cases of naturalized citizens who reside in foreign countries other than those from which they came."
>
> "For the reasons mentioned, Congress, in the provision of the second paragraph of section 2 of the act of March 2, 1907 (34 Stat. 1228) drew a clear distinction between native and naturalized citizens with reference to the effect of foreign residence upon the right to continued recognition and protection as citizens of the United States. The presumption of loss of citizenship, provided therein, as a result of protracted residence abroad, is expressly limited to naturalized citizens."

The report then described 13 cases as "illustrative of many presented to the Department of State in recent years, in which naturalized citizens of the United States who had resumed residence in their native lands called upon the Department for recognition and protection as citizens of the United States." *Id.* at p. 72.

The letter of the Committee transmitting its report and draft code to President Roosevelt included the following statement:

> "Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from transmitting American nationality to their foreign-born children having little or no connection with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside." *Id.* at p. vii.

The letter also stated that none of the provisions in the draft code submitted by the committee were "designed

to be punitive or to interfere with freedom of action" but were intended to deprive of citizenship those persons who had shown that "their real attachment is to the foreign country and not to the United States." *Id.* a p. vii.

After the President transmitted the report and draft code of the committee to Congress in 1938 the code was introduced as a bill in the House and extensive hearings were held by the House Committee on Immigration and Nationalization. Mr. Flournoy, Assistant Legal Adviser of the State Department, in commenting on the provision regarding naturalized citizens stated:

> "We have every day in the State Department cases of persons applying to us for passports or protection, or asking us to support claims, who have been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years." *Id.* at p. 134.

At the conclusion of the hearings in June 1940 a new bill was drawn up and introduced as H.R. 9980. Although there were changes from the draft code submitted by the President, the Nationality Act adopted in 1940 incorporated as Section 404(b) the precise provision of the draft code for expatriating naturalized citizens who reside in their country of origin for three years. 54 Stat. 1170. Since then the provision has been incorporated into the Immigration and Nationality Act of 1952 as Section 352 (a)(1).

It seems plain from the background of Section 352(a)(1) that problems in the field of international relations gave rise to its enactment by Congress—problems attributable to naturalized citizens who take up residence for prolonged periods in the foreign country of their origin.

The question of the power of Congress to enact legislation depriving individuals of their American citizenship was first raised in the courts by *Mackenzie* v. *Hare*, 239 U.S. 299. The plaintiff in that case, Mrs. Mackenzie, a

native-born American married a British subject permanently residing in this country. They continued after their marriage to reside here. There was then in force a statute [since repealed] providing: "That any woman who marries a foreigner shall take the nationality of her husband." 34 Stat. 1228. Registration as a voter was denied Mrs. Mackenzie on the ground that she had ceased to be an American citizen. The question before the Supreme Court was: *"Did she cease to be a citizen by her marriage?"* 239 U.S. 307. She had never intended or desired to give up her American citizenship. She challenged the constitutionality of the statute insisting that it was "beyond the authority of Congress" to take her citizenship away, and that her citizenship "was an incident to her birth in the United States, and, under the Constitution and laws of the United States, it became a right . . . which could not be taken away from her except as a punishment for crime or by her voluntary expatriation." The court upheld her expatriation, stating in part:

> "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries . . . It may be conceded that a change of citizenship cannot be arbitrarily imposed . . . The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it and her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. . . . The marriage of an American woman with a foreigner . . . may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation . . . This is no arbitrary exercise of government . . . It is the conception of the legislation under review

that such an act may bring the Government into embarrassments and, it may be, into controversies."

Recent cases bearing on expatriation of a citizen without his consent include: *Perez* v. *Brownell*, 356 U.S. 44, and *Trop* v. *Dulles*, 356 U.S. 86, decided in 1958; *Kennedy* v. *Mendoza-Martinez* and *Rusk* v. *Cort*, 372 U.S. 144, decided in 1963. Each of these cases involved a man who had acquired United States citizenship by birth in this country, and had committed some act which a statute of the United States ordained should automatically terminate his American nationality.

In *Perez* v. *Brownell*, *supra*, the plaintiff, Perez, was born in Texas. He moved to Mexico with his parents when he was about ten years old. He entered the United States in each of the years 1943 and 1944 for temporary employment. At that time he was about 34 years of age and claimed to be a native-born citizen of Mexico. In 1946 he voted in Mexico in a political election. In 1952 he again entered the United States for employment. Following an order for his deportation in 1953 as an alien not in possession of a valid immigration visa, he brought suit for a judgment declaring him to be a national of the United States. Relief was denied on the ground that he had expatriated himself under a statute imposing loss of nationality upon a citizen for "voting in a political election in a foreign state . . ." 8 U.S.C. 1481(a)(5).

The rationale of the Supreme Court in *Perez* was that the withdrawal of citizenship of Americans who vote in foreign political elections is reasonably calculated to effect the avoidance of embarrassment in the conduct of foreign relations and that Congress acted "pursuant to its powers to regulate the relations of the United States with foreign countries" when it provided "that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship." Accordingly the denationalization of Perez for

such voting was sustained. Four members of the court dissented, three on the ground that Congress lacks power to take away the citizenship of a native-born American. The fourth dissenter, although believing that Congress may expatriate a citizen for an act likely to embarrass the Government in the conduct of foreign affairs, deemed the statute "too broadly written to be sustained on that ground."

In *Trop* v. *Dulles, supra,* the alleged expatriating act was "deserting the military . . . forces of the United States in time of war" followed by conviction and dishonorable discharge. 8 U.S.C. 1481(a)(8). In *Kennedy* v. *Mendoza-Martinez* and in *Rusk* v. *Cort, supra,* the alleged expatriating act was remaining outside the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military or naval forces of the United States. 8 U.S.C. 1481(a)(10). In each of these three cases the majority of the Supreme Court characterized the statute involved as punitive and held it unconstitutional, four members of the court dissenting on the ground that the statute resulted from the proper exercise by Congress of its war powers.

We turn now to the questions presented in this case, bearing in mind the diplomatic and legislative history already related as well as the Supreme Court decisions to which we have referred. The plaintiff says that Section 352(a)(1) bears no reasonable relation to any power granted to Congress. We believe, however, that the requisite rational relation exists between this statute and the power of Congress to deal with foreign affairs. Stated differently, we believe that the denationalization imposed by this provision is reasonably calculated to effect the end that is within the power of Congress to achieve—the avoidance of embarrassment and controversies in the relations of the United States with other countries. "The termina-

tion of citizenship terminates the problem." *Perez* v. *Brownell*, 356 U.S. 44 at 60.

Now, we come to the contention of the plaintiff that the challenged statute is discriminatory and violative of due process in that it withdraws citizenship from naturalized Americans for continuous foreign residence while native-born Americans, without losing their citizenship, may reside abroad indefinitely. Like any other congressional enactment, a law passed by Congress in the exercise of its power to regulate foreign affairs must meet the requirement of due process. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 at 164. The due process guaranty of the Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, at 525.

Due process does not require that all citizens be treated in the same way. *Hirabayaski* [*sic*] v. *United States*, 320 U.S 81. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 at 895. In legislating within the scope of its powers, a lawmaking body has discretion in classification, and due process is not offended where the classification has a rational basis and is reasonably related to the legislative purpose. Under this concept, for example, the Supreme Court upheld in *Mackenzie* v. *Hare, supra*, a federal law divesting the citizenship of women but not of men marrying foreigners, and in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, a state law for the setting of minimum wages for women even though the law did not extend to men. See also *Hoyt* v. *Florida*, 368 U.S. 57.

The statute which the plaintiff challenges applies only to a particular class of naturalized citizens—those residing continuously for three years in the foreign country of their birth. It does not apply to other naturalized

citizens nor to native-born citizens. By this statute the Congress recognized, on the basis of experience and history, that the problem of naturalized citizens residing at length in the country of their origin has far greater potential for causing international problems than foreign residence by citizens under other circumstances.

Stated differently, the application of the statute in question to foreign-born persons who become naturalized in the United States and return to reside for prolonged periods in the country of their origin is accounted for by the long history of friction between the United States and other nations relative to this particular class of naturalized citizens. The statute deals with them as the principal source of the problem of maintaining international relations in the face of demands for protection and similar relief.

If a law presumably provides a remedy where it is most needed, it is not to be overthrown because there are other instances to which it might have been applied. *West Coast Hotel Co.* v. *Parrish, supra,* at page 400.

We think that Section 352(a)(1) satisfies the requirement of due process. It rests on a rational foundation, and has a substantial relation to the object which Congress sought to accomplish by its enactment.

The remaining principal contention of the plaintiff is that the withdrawal of nationality under the challenged statute constitutes cruel and unusual punishment in a constitutional sense. Congress, in enacting this legislation, did not aim at punishment of the persons coming within its purview, but at lessening friction and controversies in our relations with other nations. In the light of these circumstances, it cannot fairly be said that the statute is punitive in nature. *Flemming* v. *Nestor,* 363 U.S. 603, 613 *et seq.*

We touch now on some of the arguments urged upon us by the plaintiff in support of her main contentions.

As the plaintiff is not a dual national it is suggested that her foreign residence does not entail any problems incident to a dual nationality status. However, it is to be noted that in each of the two years following her marriage the plaintiff gave birth to a son in Germany who is now possessed of dual nationality, that is, the nationality of Germany and the nationality of the United States. International complications may reasonably be foreseen from such a situation since dual nationality "refers to the fact that two States make equal claim to the allegiance of an individual at the same time." *Perkins* v. *Elg*, 307 U.S. 325, at 344. Moreover, dual nationality has long been a perennial source of friction between nations. Section 352(a)(1) having terminated the plaintiff's American citizenship in 1959, any child or children since or hereafter born to her in Germany would have the nationality of Germany but not that of the United States.

The Congress that passed the Nationality Act of 1940 (the statute that brought Section 352(a)(1) to its present form) was fully conscious of the problems incident to dual nationality. Among the reasons Congress had for terminating the American nationality of naturalized citizens taking up residence abroad is that such termination will prevent them from transmitting American nationality to their foreign born children and embroiling this government in controversies which they may have with the governments of the foreign countries in which they reside.[12]

According to the plaintiff, the upholding of the challenged statute "as a proper exercise of the foreign affairs power would require a showing that the mere residence abroad of naturalized citizens in and of itself raises serious

[12] 86 Cong. Rec. 11944, 11949. See also Nationality Laws of the United States, 1938, part 1, Committee Print, 76th Cong., 1st Sess., at p. vii.

problems affecting the conduct of our foreign affairs . . ." [13] However, according to the Supreme Court in *Borden's Co.* v. *Ten Eyck*, 297 U.S. 521, at 263:

> "Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary."

The long recognized test is set forth in *Borden's Co.* v. *Baldwin*, 293 U.S. 194 at 209, by the then Chief Justice (Charles Evans Hughes) as follows:

> "But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption . . . When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

Certainly in this case there has been shown a reasonably conceivable relation between the method chosen and the problem which Congress saw and sought to remedy under its foreign affairs power.

It has also been suggested that foreign residence by the plaintiff is a neutral act. However, settlement by a naturalized citizen in the foreign country of his nativity and the centering there of all his primary interests, as the plaintiff has done, is conduct traditionally regarded by this government as evidence tending to show an intentional surrender of American citizenship or as importing some transfer of allegiance to the foreign country.[14]

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[13] Brief for Petitioner in the Supreme Court of the United States, Oct. Term 1962, No. 251, pp. 34-35.

[14] H.R. Doc. No. 326, 59th Cong. 2d Sess., p. 27; 3 Moore, Digest of International Law, p. 739.

Finally, the plaintiff insists that she is an American by training, in thought and in feeling, and that she values highly her American citizenship. But these sentiments, however sincere, were not conducive to her retention of residence in the United States. Nor is there anything in the record to show that since leaving this country she has performed any of the duties of American citizenship or that she ever intends to return to assume them. By voluntarily going to the foreign country of her birth and there continuously residing for three years, she has brought on her expatriation.

We conclude that the challenged statute must be upheld as a constitutional exercise by Congress of its power to regulate foreign affairs, and hence that the plaintiff is not a citizen of the United States. Accordingly the motion of the plaintiff for summary judgment will be denied, and the motion of the defendant for judgment on the pleadings will be granted.

BURNITA SHELTON MATTHEWS
United States District Judge

RICHMOND B. KEECH
United States District Judge

FAHY, Circuit Judge, *dissenting.*

It is apparent from the review of relevant legislation in the majority opinion that a strong case exists for holding that Congress reasonably concluded that a relation or nexus exists between the conduct of foreign affairs and residence abroad of some naturalized citizens. This I would not dispute. But when we consider whether the means adopted, and applied in this case, to further the conduct of foreign affairs meet the requirements of due process of law a more difficult problem is presented. Thus, such relation to or nexus with foreign affairs (1) may exist with respect to some native-born citizens who reside abroad, and is not limited to naturalized citizens; (2) is

not shown to exist in all cases of naturalized citizens whose residence abroad brings them within Section 352(a)(1); (3) appears not to have been weighed by Congress in connection with the impact of Section 352(a)(1) upon the citizenship of one group of Americans vis-a-vis another; (4) is with respect to aspects of foreign affairs which are administrative and routine in nature rather than those ordinarily associated with the authority of the Executive and of Congress to conduct the foreign affairs of the nation; (5) is largely due to problems arising from dual nationality; (6) creates problems not shown to be reasonably capable of solution by means less drastic than the total deprivation of nationality.

Conscious of the deference the courts must accord to the Acts of Congress, conscious also of the judicial obligation when the application of an Act to an individual deprives him or her of the priceless attribute of American citizenship, and renders him or her stateless, *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958), and conscious further of the characterization by the Supreme Court of such deprivation in other circumstances as a cruel and unusual punishment, I conclude for the reasons now to be discussed that the application of Section 352(a)(1) so as to deprive plaintiff of her citizenship by operation of law would be inconsistent with due process of law.

Legislation seeking to terminate nationality has been considered by the Supreme Court in three recent cases. *Perez* v. *Brownell*, 356 U.S. 44 (1958), *Trop* v. *Dulles*, *supra*, and *Kennedy* v. *Mendoza-Martinez*, and *Rusk* v. *Cort*, 372 U.S. 144 (1963). In *Perez* denationalization of a native-born was upheld under Section 401(e) of the Nationality Act of 1940, now part of Section 349 of the Act of 1952, 8 U.S.C. § 1481(a)(5), which provides for the loss of nationality by

> voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory. . . .

A nexus was found between the power of Congress over the conduct of foreign affairs and "active participation, by way of voting, of American citizens in foreign political elections." 356 U.S. at 59 and 60. It was said that withdrawal of citizenship was reasonably calculated to effect an end which Congress could lawfully achieve, namely, the avoidance of embarrassment in the conduct of our foreign relations. The Court added, however,

> [T]he fact is not without significance that Congress had interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

356 U.S. at 60-61.

In *Trop* v. *Dulles*, *supra*, decided the same day, the Court held that a native-born American did not lose his citizenship and become a stateless person as a result of a court martial conviction for desertion followed by a dishonorable discharge. In so deciding the Court held Section 401(g) of the Nationality Act of 1940, as amended, to be unconstitutional.[1] The Chief Justice, joined by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Whittaker, while accepting *Perez* as upholding congressional authority to denationalize—contrary to their dissenting views in

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[1] This Section provides that a person who is a national of the United States, whether by birth or nationality, shall lose his nationality by,

> Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces . . .

now embodied in the 1952 Act as 66 Stat. 267, 8 U.S.C. § 1481 (a)(8).

Perez[2]—as distinct from recognizing the right of voluntary expatriation, nevertheless concluded that to terminate Trop's nationality under Section 401(g) would be cruel and unusual punishment, violative of Article VIII of the Constitution. Mr. Justice Brennan joined in holding the Section unconstitutional. He pointed out that the conditions which led him to sustain denationalization in *Perez* were not met in *Trop;* there was not the requisite rational relation between Section 401(g) and the power relied upon by Congress to support the deprivation, namely, the power "to raise and maintain military forces to wage war."

In *Kennedy* v. *Mendoza-Martinez, supra,* which I shall refer to without separate mention of the companion *Cort* case, the Court held invalid Section 401(j) of the Nationality Act of 1940, like § 349(a)(10) of the Act of 1952, 8 U.S.C. § 1481(a)(10), which sought to deprive an American of his nationality for departing from and remaining outside the jurisdiction of the United States in time of war for the purpose of evading military service. As in *Trop* the Court held that this was punishment for the proscribed conduct and, all else aside, could not be inflicted in a manner which did not comply with the procedural safeguards of the Bill of Rights, particularly those of the Fifth and Sixth Amendments.

In our own earlier case of *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 176 F.2d (1949), denaturalization was upheld under the statutory provision: "A person who has become a national by naturalization shall lose his nationality by . . . (c) residing continuously for five years in any foreign state" with exceptions not applicable. Judge Edgerton dissented on the grounds (1) Congress may not discriminate against naturalized citizens and (2) arbitrary discrimination is not due process of law. He relied in

[2] Mr. Justice Whittaker, dissenting from the result reached in *Perez,* did not reach the constitutional question in that case.

part upon *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), and the opinion of Chief Justice Marshall in *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738 (1824). Citing *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915), the opinion of the majority in *Lapides* referred to the implied power of Congress to provide for denationalization upon the basis of a classification which had a reasonable relation to a legitimate legislative end. The end sought was to lessen friction with foreign governments, and the legislation was also said to deal with a condition "voluntarily brought about by one's own acts, with notice of its consequences," for which reason it was said there was concurrence by the citizen in the loss of nationality. The intervening Supreme Court opinions, both majority and minority, in *Perez*, *Trop* and *Medoza-Martinez*, do not rely upon a theory of concurrence, and so I do not accept the views in that regard expressed in *Lapides*. Voluntary residence abroad of a nationalized citizen for a longer period than is specified in Section 352(á)(1) does not constitute voluntary expatriation. Such residence does not deprive the national of the right to challenge the validity of the Section.

Coming now to the earlier Supreme Court case of *Mackensie*, [*sic*] leaned upon in *Lapides*, it was there held that a statute which provided that "any American woman who marries a foreigner shall take the nationality of her husband"—a provision no longer in our statutes—involved the ancient principle of identity of husband and wife, then to some degree still adhered to. This permitted Congress to impute to the wife a kind of voluntary renunciation of citizenship or expatriation. Without attempting to explore the areas within which the law may treat the sexes differently—the power to do so consistently with due process is hardly deniable—it is noted that the Chief Justice, dissenting in *Perez*, pointed out that the effect of *Mackensie* [*sic*] was only to hold in abeyance the citizenship

of the American woman, rather than to terminate it. 356 U.S. at 69-73.[3]

Savorgnan v. *United States*, 338 U.S. 491 (1950), was also relied upon in *Lapides*. There the native born American was found to have expatriated herself by applying for and obtaining naturalization as a citizen of Italy and by taking an oath of allegiance to the King of Italy. In thus expatriating herself she exercised a right long recognized by the United States and restated in *Trop*.

I come to consider the present case in light of the foregoing decisions, particularly those recently decided by the Supreme Court. In the first place the statute has about it something of the nature of legislative banishment. It applies only to a well defined group of citizens, who are subjected to a particular deprivation to follow automatically from conduct the statute proscribes, which takes no account of variations among individual cases. It appears to be an effort to regulate, although indirectly, conduct that occurs only in a foreign state, engaged in by persons whose presence there might be troublesome. Advised that it was difficult to prevent or remedy locally in the foreign states, through diplomatic channels, whatever the "difficulty and embarrassment" might be, and eschewing other possible remedies should embarrassment in fact occur, Congress was persuaded to legislate a process which cuts

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[3] In his dissenting opinion in *Mendoza-Martinez*, in which Mr. Justice White joined, Mr. Justice Stewart stated: "This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country." 372 U.S. at 214. And it cannot fairly be said that the present case is of that character. In this connection it is of some significance that plaintiff is not a dual national.

off the offending citizen from the American body politic.[4] The majority opinion refers to the statement in *Perez* that this terminates the problem by terminating citizenship. Such a remedy for the problem posed by the Executive in 1938 and involved in the present case, though not in *Perez*, raises constitutional questions which are not answered by pointing to the administrative convenience to be achieved in this manner, the principal basis which was advanced for the remedy.[5] President Truman's Commission on Immi-

[4] It seems fairly clear from the discussion centering upon the 13 illustrative cases cited in support of Section 352(a) when it came before Congress in 1938, that what was sought to be avoided was the necessity in each case to decide—either administratively or judicially—whether an individual had abandoned his American citizenship by continued residence in the land of his birth or prior nationality. These illustrative cases do not disclose what disputes arose, if any, between the Government of the United States and the foreign governments in connection with the various individual claims for passports, registration, or presentation of claims. Rather the fact merely of foreign residence for various periods and under such circumstances as were said to indicate no present intention to resume United States residence seems to be the embarrassing element in these cases. See *Nationality Laws of the United States*, House Committee Print, Part I, pp. 72-76 (1938).

[5] See note 4, *supra*. The problem seems to have been one of the Government's unwillingness to process legitimate claims of a citizen like presentation of a claim against the host state or issuance of a passport. In some of the cases cited the person involved had served in a foreign army, but this is separately dealt with under the 1940 legislation. Furthermore questions of re-naturalization by another state were present, sometimes with an indication that it may have been involuntarily imposed. In this connection the statement of Secretary of State Bayard, in regard to such a situation vis-a-vis Mexico in 1886, should be recalled:

> The United States, while claiming for aliens within its jurisdiction, and freely conceding to its citizens in other jurisdictions the right of expatriation, has always maintained that the transfer of allegiance must be by a distinctly voluntary act, and that the loss of citizenship cannot be imposed as a penalty nor a new national statute forced as a favor by one Government upon a citizen of another.

U.S. For. Rel., 1886, 723.

gration and Naturalization in 1953 said the following about the denaturalization provisions here involved:

> By attaching strings to a naturalization order, they create a body of citizens unable to do, except on penalty, what other citizens may do.
>
> Secondly they undo a judicial determination without the benefit of court action. . . . Judgments in naturalization should [like other court decrees] be vested with finality. If fraud in obtaining naturalization is suspected, a judicial proceeding to set aside the judgment is necessary. . . . The loss of naturalized citizenship by reason of mere residence abroad should not result from legislative fiat.

"Whom We Shall Welcome," Report of the President's Commission on Immigration and Naturalization 239-40 (1953). I do not say, however, that denationalization under Section 352(a)(1) is punishment; it does not appear that Congress intended by this Section to effect "retribution and deterrence," though the provision points in that direction.[6]

Another aspect of the problem is noted preliminarily to enlargement upon the view that the statute violates the Fifth Amendment in its discrimination against naturalized citizens, the chief basis for my dissent. It is by no means clear that deprivation of citizenship for foreign residence is a proper exercise of the foreign relations power in the case of this plaintiff, aside from its discrimi-

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[6] See *Mendoza-Martinez, supra*, 372 U.S. at 168, where some of the indicia of legislative punishment are discussed. Punishment is judicially regarded as the *sine qua non* of a bill of attainder. See *United States* v. *Lovett*, 328 U.S. 303 (1946). And the element of past conduct, or an ex post facto flavor, if it be required, may be lacking for a determination that this Act constitutes such a bill. However that may be, the quality of punishment insofar as the due process of the Fifth Amendment and the rights guaranteed by the Sixth Amendment are concerned, is not entirely absent here.

natory feature. The premise stated by Mr. Justice Frankfurter in *Perez, supra,* to sustain the loss of citizenship where the individual had voted in a foreign election, should not be read as holding that such a power sweeps all before it. Voting has traditionally been considered one way a person indicates his political allegiance. And our earliest statute on denationalization had to do primarily with codifying the ways by which it could be objectively determined that a citizen had exercised his right voluntarily to expatriate himself.[7] It does not follow that any governmental action connected in some way with foreign relations can be judicially approved notwithstanding the Bill of

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[7] In the early days of the country, the United States was the international champion of every individual's right to expatriate himself. In 1868, Congress declared by statute that the right of expatriation is a natural and inherent right of all people. We were then welcoming and seeking immigrants from the Old World and the refusal of European rulers to recognize American naturalization of its former subjects was a matter of concern to us.

But although the United States recognized and espoused the inherent right of all persons to expatriate themselves, our own laws were silent as to what actions by our citizenry would result in voluntary expatriation or involuntary forfeiture of citizenship. The courts and administrative officers solved such issues as they arose. In 1907, Congress declared that any American citizen shall be deemed to have expatriated himself when he has been naturalized in a foreign state or has taken an oath of allegiance to any foreign state. Except for statutes providing for loss of the rights of citizenship in time of war by deserters or draft evaders, the law remained unchanged until the enactment of the Nationality Act of 1940. "Whom We Shall Admit," *supra,* at 242. The President's Commission in conclusion recommended that only a presumption of loss of citizenship should be created by a three year residence in the land of one's birth. *Id.,* at 240. Interestingly enough the courts under the 1907 statute took the view that the presumption related to loss of diplomatic protection and not citizenship itself, a view which has been credited to Attorney General Wickersham in an opinion of 1910. *Nationality Laws of the United States, supra,* at 70.

Rights. And our constitutional authority is not defined by reference to the sovereign powers of other nations. For ours is a limited government, deliberately so designed with certain rights guaranteed against invasion by the Government.

The right to a nationality is a fundamental one. Our Government has approved the provisions to that effect in the Universal Declaration of Human Rights, Art. 15. Of course under principles of international law a state may decide for itself what criteria must be met in order that citizenship may be achieved. See *United States* v. *Schwimmer*, 279 U.S. 644 (1929); *Briggs, The Law of Nations*, 459-62 (1952). And the United States is not bound by a treaty on the subject. A Covenant was to follow the Declaration of Human Rights but has not been entered into. Nevertheless it will no doubt be generally acknowledged that persons may not arbitrarily be deprived of their nationality, an attribute essential to the full possession of personal dignity. Especially is this so when statelessness results from denationalization.

> In recent times statelessness has become a serious problem. It is an anomaly in the international legal order. A stateless person does not enjoy the protection of any state and is often excluded from many rights and privileges in the state where he resides.

"The Universal Declaration of Human Rights, A Standard of Achievement" 8 (U.N. Publ. No. 62.1.9, 2d ed.). See also the Court's opinion in *Mendoza-Martinez, supra*, 372 U.S. at 160-61.[8] The accepted idea in our nation in the 19th Century that a person may flee one country and cleave to another—if he chooses—is a long way from the notion that a citizen who leaves this country to take up for a term of years residence in a country with which he has had past association has thereby (a) manifested an intention to assume another nationality, or (b) indicated a de-

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[8] Earlier legislation seems to reflect these principles. See note 7, *supra*.

sire to be rid of the responsibilities of American citizenship, or (c) assumed a status so awkward for the United States Government that his intentions are not relevant and national policy requires the general severance of the ties of citizenship of all those coming within the category described in Section 352(a)(1). The first two alternatives are obviously arbitrary in the absence of a determination on a case by case basis, and the third, which more nearly represents the position of the Government, would seem to call for justification under the foreign relations power by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived.

In the end, however, the basis for my dissent is that the statute is violative of due process of law in that it unfairly discriminates against the naturalized citizen. Due process requires the "equal protection of the laws," terms appearing in the Fourteenth Amendment applicable to the states, but applicable also to the Federal Government by reason of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The provision for termination of the nationality of a naturalized citizen because of three years continuous residence in the territory of a foreign state of which he was formerly a national, or in which his birthplace is situated, cannot apply to a native-born citizen. By definition the latter does not acquire his citizenship by naturalization. The inequality in treatment is apparent. The statute as applied to plaintiff imposes upon her the serious consequence of loss of nationality due to foreign residence whereas a national born on American soil may reside abroad indefinitely, and for any reason, without such loss.[9]

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[9] We note the special demand made on a person who acquires a dual nationality at birth—by place of birth or by parentage—and who after age 22 resides in the state other than the United States for three years. Under certain conditions he must take an oath of allegiance to the United States during the period of three years. 8 U.S.C. § 1482. *Cf. Mandoli* v. *Acheson*, 344 U.S. 133 (1952).

The Constitution, however, does not require the law to treat all persons alike. Differences due to reasonable classifications may be valid. This has been recognized with respect to age, sex, occupation, and other factors. The question remains, however, whether this principle can justify taking away the nationality of one national for reasons not made applicable to another national, and, if so, whether the basis asserted for doing so justifies such a severe inequality imposed by law.

The present classification is not based on voting in a foreign political election, as in *Perez*, or on taking an oath of allegiance to a foreign state, as in *Savorgnan*. It is based on place of birth and residence. The inequality in treatment arises after American nationality has been conferred. This is contrary to the general policy of our laws to maintain equality in the status of citizens. A difference which antedates naturalization may not readily be revived after citizenship is acquired and by such revival create a more vulnerable type of citizenship than is possessed by the native-born. Whatever exceptions might be recognized the decided trend of law is to consider the naturalized citizen like the native-born. There is the exception that the President must be native-born because in this respect the Constitution adopted at the beginning of the Republic so provides.

Let us assume, however, that Congress has authority to draw distinctions between the native-born and the naturalized and to classify for some difference in treatment the naturalized citizen who leaves the United States to live in the country of his birth. Let us assume, in other words, that there is a reasonable basis for Congress to conclude that such a person is more likely than the native-born to embarrass the United States in the conduct of foreign affairs, though both live in the same foreign state for the same length of time and one bears no greater allegiance to the United States than the other. Whether a law under which only the naturalized national entirely loses his

nationality by such residence is consistent with due process of law requires a decision whether the adoption of such severe inequality of treatment as a means to the end sought by Congress in decreeing it is reasonable in a legal sense when all its consequences are considered. See Mr. Justice Stewart's dissent in *Mendoza-Martinez*, in which Mr. Justice White concurred, 372 U.S. at 214, where it is said in reference to *Trop* that it was there emphasized "that the harshness of denationalization for conduct so potentially equivocal was 'an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted power'" quoting the concurring opinion of Mr. Justice Brennan in *Trop*, 356 U.S. at 110.

As to the harshness of the deprivation and its consequent inequality we need not dwell upon the many references in Supreme Court opinions to the preciousness of American nationality, and the cruel and unusual character of a law which terminates it. Moreover, in the present case, there is a complete absence of conduct hurtful to the United States in plaintiff living with her husband at the place of his work and residence in a foreign state.[10] That the place is also in the state of her birth is fortuitous. She did not seek to live there, but rather as a young American she met and married a man who makes his living there. She is not a draft evader or a deserter or one who votes in a foreign political election or swears allegiance to a foreign state. Yet she is put to the choice of abandoning

[10] In this regard the majority opinion seems to take a different view: "But these sentiments [of wishing to remain an American], however sincere, were not conducive to her retention of residence in the United States." But Congress has not indicated in the legislation under consideration that its purpose was to keep Americans at home, but rather to promote the smooth working of our foreign relations. Furthermore, we must not confuse the problem in this case with the problem of fraudulent acquisition of citizenship, separately dealt with under the 1940 legislation.

either her husband or her nationality. No comparable choice is required of a national born on American soil who lives abroad in like circumstances.

It is not suggested that she has been a source of embarrassment in the conduct of our foreign affairs; the statute covers her situation because it applies across the board, as it were, to all foreign born. On the other hand a national born in America may safely carry his nationality abroad without fear of losing it even if his presence proves diplomatically embarrassing in the extreme—provided of course he does not engage in conduct specifically proscribed, such as voting in a foreign political election.[11] A total loss of nationality occurs in the case of one with no deprivation at all in the case of the other. An inequality of treatment of so severe a character, made on an uncertain basis for any actual difference in the effect of residence of one in comparison with residence of the other on the conduct of foreign affairs, does not meet the test of reasonableness in the means adopted for accomplishing the legislative purpose. A reasonable classification for some purposes does not justify the law in imposing an inequality among citizens out of proportion to the purpose for which the classification is made. See, again, *Trop*, 356 U.S. at 110 and 114 (concurring opinion), and our reference above to the dissenting opinion of Mr. Justice Stewart in *Mendoza-Martinez*. Though I assume denationalization in plaintiff's case possibly would tend to avoid some possible embarrassment in the conduct of foreign affairs it is not shown that the embarrassment would be either certain or substantial, and in any event the assumption that denationalization avoids some embarrassment incident to residence abroad applies to the native-born as well as to the naturalized national.[12] See *Worthy* v. *Herter*, 106 U.S. App. D.C. 918, 270 F.2d 905 (1959), *cert. denied*, 361 U.S. 918 (1959). The difference in

[11] But see note 9, *supra*.

[12] See notes 4 and 5, *supra*.

degree of embarrassment, if any, is not shown to be substantial enough to warrant so great a difference in the consequence meted out only to the naturalized citizen. Constitutional power should not be over-extended so as to deprive plaintiff of a fundamental liberty upon so tenuous a basis.

Perhaps the matter can be stated more simply. The Supreme Court has held in the case of a convicted deserter that denationalization is a punishment so cruel and unusual as to violate the Eighth Amendment. The Court has also held in the case of one who leaves and remains outside the jurisdiction of the United States in time of war for the purpose of evading military service that denationalization is a punishment which, if to be upheld at all, must be accompanied by the safeguards of procedural due process of law. It would seem necessarily to follow from these decisions that in the case of the plaintiff denationalization, which is just as severe as in the two cases referred to, would create such a serious inequality among Americans upon so tenuous a basis that it fails the test of reasonableness which substantive due process requires of all legislation, especially that which restricts the liberty of the citizen.[13] What is cruel and unusual under the Eighth Amendment for the deserter *a fortiori* is unreasonable in its solitary application to a naturalized citizen under the Due Process Clause of the Fifth Amendment. Indeed, were there no Eighth Amendment it is probable the conclusion reached in *Trop* and *Mendoza-Martinez* would rest equally well upon the Due Process Clause alone.

I would grant plaintiff's motion for summary judgment.

CHARLES FAHY
Circuit Judge

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[13] We are not concerned here with the greater latitude by which the reasonableness of legislation concerning economic problems is to be judged, but with the stricter test applicable to a deprivation of personal liberty.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 324-60

ANGELIKA L. SCHNEIDER, *Plaintiff*,

v.

DEAN RUSK, *individually and as Secretary of State, Defendant.*

Judgment

This cause having come before the Court on plaintiff's motion for summary judgment, and defendant's motion for judgment on the pleadings; counsel having been heard; the Court having considered the record and entered its memorandum opinions in the case on May 21, 1963,

It is this 10th day of June, 1963,

ORDERED, ADJUDGED AND DECREED:

(1) That defendant's motion for judgment on the pleadings be, and the same hereby is, granted; and

(2) That plaintiff's motion for summary judgment be, and the same hereby is, denied, and her action is hereby dismissed.

BURNITA SHELTON MATTHEWS
United States District Judge

RICHMOND B. KEECH
United States District Judge

I dissent:

CHARLES FAHY
Circuit Judge

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually, and as Secretary of State,
Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, *Appellant,*

v.

DEAN RUSK, individually, and as Secretary of State, *Appellee.*

BRIEF FOR APPELLANT

OPINION BELOW

The majority opinion of the three-judge District Court and the dissenting opinion of Circuit Judge Fahy was entered on May 21, 1963 (R. 32) and are reported at 218 F. Supp. 302.

JURISDICTION

On June 7, 1963 a three-judge District Court, one judge dissenting, entered a judgment (R. 67) granting appellee's motion for judgment on the plead-

ings, denying appellant's motion for a summary judgment of injunction, and dismissing the action. A notice of appeal was filed in the District Court on June 27, 1963 (R. 68).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

This Court noted probable jurisdiction on October 28, 1963 (R. 70).

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived appellant of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to consequences not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the appellant.

4. Whether Section 352(a)(1) is unconstitutional because it imposes punishment or other sanctions without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, Section 8, Clause 4 of the Constitution provides

> "The Congress shall have Power . . . To establish an uniform Rule of Naturalization, ..."

The Fifth Amendment to the Constitution provides in pertinent part

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ., and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense."

The Eighth Amendment to the Constitution provides in pertinent part:

> ". . . [N]or [shall] cruel and unusual punishments [be] inflicted."

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads as follows:

> "Loss of nationality by naturalized national
>
> "(a) A person who has become a national by naturalization shall lose his nationality by—
>
> "(1) having a continuous residence for three years in the territory of a foreign state of which

he was formerly a national or in which the place of his birth is situated, except as provided in seciton 353 of this title, whether such residence commenced before or after the effective date of this Act;

"(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.

"(B) (1) For the purpose of paragraph (1) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 of this title shall not be counted in computing quantum of residence.

"(2) For the purpose of paragraph (2) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 and 354 of this title shall not be counted in computing quantum of residence."

Section 101 of the Immigration and Nationality Act of 1952, 66 Stat. 166, § 101(a)33, 8 U.S.C. § 101(a)33 reads as follows:

"The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

The text of other relevant provisions of the Immigration and Nationality Act of 1952, Sections 353, 354, and 356 are attached to this brief as an appendix.

STATEMENT OF THE CASE

Appellant was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family. On December 4, 1950, petitioner became a citizen of the United States by derivative naturalization, through the naturalization of her mother (R. 2, 9, 17, 34).

Appellant lived in the United States continuously from 1939 to 1954—from age five to age twenty. She was educated at grade school at Croton-on-Hudson, New York, in high school at Cornwall-on-Hudson, New York, and Flushing, Queens, New York, and at Smith College in Northampton, Massachusetts, where she was graduated in 1954 with the degree of Bachelor of Arts. Thereafter, she studied at the University of Bern in Switzerland from 1954 to 1955 on a scholarship given by the Institute of International Relations in New York, and in the following year was a full-time student at the Sorbonne in Paris. She returned to the United States in April 1956, took up residence in Nutley, New Jersey and was employed in New York City (R. 2, 9-10, 17, 34).

On June 6, 1956, appellant left the United States to marry Dr. Dieter Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom appellant had become engaged while studying in Paris. Since that time, appellant lived continuously with her husband in the Federal Republic of

Germany, for a period of more than three years, except for one six-week family visit to the United States, in September and October of 1957 (R. 2, 10, 18, 34-35).

The two sons born to appellant, one in 1957 and the other in 1958 were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate (R. 3, 10, 19).*

During all the time of her residence in Germany until June 1959, appellant was in possession of a valid United States passport. In June 1959, however, the United States Consulate in Dusseldorf refused to grant appellant an extension of her passport contending that appellant had lost her United States citizenship. In September 1959, appellant was requested by the American Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, appellant was served with a "Certificate of Loss of Nationality of the United States" (R. 2, 3, 10-11, 19-20, 35).

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed by letter of January 20, 1960, the previous administrative decision that appellant had lost her citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952. This action was, under the regulation, the "final administrative determination" of the State Department, leaving appellant without further administrative remedy. Pursuant to this ruling appellant is now being denied all rights and priv-

* There are two younger sons of appellant's born subsequent to the institution of these proceedings, whose existence is not reflected in the record, but whose citizenship depends on the outcome of this case.

ileges of United States citizenship, including a United States passport (R. 11-12, 21, 35).

Appellant is now residing in the Federal Republic of Germany. The authorities in Germany have given petitioner a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time (R. 1-2, 4, 7, 8, 35).

Appellant feels herself to be an American. She feels no political connection with Germany or its Government and has no political loyalty or allegiance to that country. Although she could acquire Germany citizenship because of her marriage to a German citizen she has not done so. She desires both to continue to be an American citizen and to remain with her husband and children in Germany where her husband practices his profession (R. 4, 7-9, 12, 35).

THE HISTORY OF THESE PROCEEDINGS

On February 1, 1960, appellant filed a complaint in the District Court for the District of Columbia alleging that Section 352(a)(1) of the Immigration and Nationality Act of 1952, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States. (R. 1) She sought an injunction against the enforcement of Section 352(a)(1), a declaration that she is a citizen of the United States, and certain other relief (R. 4-5).

On April 15, 1960, appellant applied for the convening of a three-judge District Court. This application was denied by the District Court on June 19, 1960 (R. 33-34).

On August 17, 1960, a single judge of the District Court entered an order denying appellant's motion for

summary judgment, granting appellee's motion for judgment on the pleadings, and dismissing the complaint. (R. 27)

The Court of Appeals, on May 11, 1962,[1] affirmed the judgment of the District Court (R. 28).

A writ of certiorari was granted by this Court on October 15, 1962, 371 U.S. 858. On February 18, 1963, before oral argument had been presented, this Court by *per curiam* opinion, vacated the judgments of the courts below and remanded the case to the District Court for trial before a three-judge court, on the ground that the constitutional questions presented were "not plainly insubstantial" and that the District Court erred in denying appellant's original application for the convening of a three-judge court (R. 29), 372 U.S. 224, 225.

A three-judge District Court was duly convened and a hearing was held on April 1, 1963. The judgment of that court was entered on June 7, 1963, Judge Fahy dissenting (R. 67). Notice of appeal was filed June 27, 1963 (R. 68).

This Court noted probable jurisdiction on October 28, 1963 (R. 70).

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[1] The time lapse between the judgments of the District Court and the Court of Appeals is accounted for as follows:

On March 24, 1961, after the case had been briefed and argued in the Court of Appeals, that court *sua sponte* postponed its decision pending this Court's decision in *Rusk* v. *Cort*, 369 U.S. 367. On April 25, 1961, the Court of Appeals denied a motion by appellant asking the court either to decide the matter promptly or certify it to this Court. On May 12, 1961, appellant petitioned this Court for a writ of certiorari before judgment. The writ was denied on June 19, 1961, 366 U.S. 963.

SUMMARY OF ARGUMENT

I

Section 352 arbitrarily discriminates against naturalized citizens in violation of the Fifth Amendment's guarantee of due process. The discriminatory and arbitrary denial of citizenship to one class of American violates the Fifth Amendment's prohibition against depriving any person of life, liberty or property without due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 498.

A. The discrimination here attempts to take away the right of citizenship in the United States from a person loyal to the United States, and bearing it allegiance merely because she is living abroad with her husband—a fact not a ground for revocation of the citizenship of a native-born citizen.

B. The citizenship sought to be taken away was acquired in good faith and the events occasioning her marriage and residence abroad were not contemplated at the time of appellant's naturalization.

C. The discrimination could not be sustained even if it were shown to assist in some legitimate Congressional objective.

1. The discrimination creates a second-class citizenship contrary to the often reiterated equality of born and naturalized citizens under the Constitution. *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.), 738, 827-828; *Luria* v. *United States*, 231 U.S. 9. It imposes on naturalized citizens because they are naturalized an obligation to reside in the United States and makes them subject to controls on residence and travel abroad which are not and could not be imposed on the native born. See *Kent* v. *Dulles*, 357 U.S. 116.

2. The discrimination imposed by Section 352 is of an invidious nature because it is based on the premise that naturalized citizens, *as a class*, are less loyal or more likely to abandon their allegiance to the United States than the native-born. Group legislation of this kind, particularly when based on such factors as national origin or foreign birth, is not permitted under the Constitution except in extreme emergency. See *Hirabayashi* v. *United States*, 320 U.S. 81, 100.

D. In any event the discrimination embodied in Section 352 may not be justified as a proper exercise of Congress' foreign affairs power. This is because the "means"—the withdrawal of citizenship of naturalized citizens on a discriminatory basis is not reasonably related to the "end"—the regulation of foreign affairs. *Perez* v. *Brownell*, 356 U.S. 44, 58. Nothing in the residence abroad of naturalized citizens has been shown to create any foreign affairs problem to justify the restrictions Congress has imposed broadly on all naturalized citizens.

1. The legislative history indicates that the statute was passed not to resolve any foreign affairs problems attending the residence abroad of naturalized citizens, but that the purpose of the statute was to strip of their citizenship naturalized citizens who reside abroad on the assumption that all such citizens have abandoned their allegiance to the United States. The statute was intended to eliminate the administrative or judicial difficulties of making a case by case determination of allegiance as was necessary under prior legislation. This is clearly arbitrary and the statute cannot be sustained on such grounds.

2. All possible difficulties said to attend the residence abroad of a few naturalized citizens have not been

shown to be incapable of resolution by less drastic legislation not broadly applicable to all naturalized citizens residing abroad. Legislation limited in its effect is clearly available to Congress, and Congress was required to use such alternate measures. See *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349. The measures Congress has adopted are clearly inappropriate to the difficulties to be dealt with. *Perez* v. *Brownell*, 356 U.S. at 60.

3. Even assuming the residence abroad of naturalized citizens may be more likely to give rise to foreign affairs problems than the residence abroad of native-born citizens, the difference in treatment which Congress has imposed is clearly out of all proportion to the possible problems which may be caused by such residence. The withdrawal of the precious right of citizenship from one citizen and not of another for the same act may not be based on such an uncertain and tenuous basis.

4. The present legislation cannot be sustained on the basis of the long resolved Nineteenth Century problems arising out of the difficulties in providing diplomatic protection to naturalized citizens. Nor did Congress legislate with this end in view.

5. There is no basis for the discrimination as a means to avoid the occurrence of dual nationality. This problem exists with respect to native-born, as well as naturalized citizens, who reside abroad. It has been and can be dealt with by more limited legislation.

II

Even apart from the discriminatory nature of Section 352 there is no rational nexus between the mere residence abroad of a citizen and any of the evils

with which Congress may deal. Congress may not, as a means for solving administrative problems or relieving administrative burdens, attach loss of citizenship to an act such as mere residence abroad which is clearly consistent with allegiance to this country. Congress may attach expatriation only to an act which entails the acquisition of a foreign citizenship or which, through participation in the political affairs of a foreign country, is inconsistent with retention of American citizenship. *Perez* v. *Brownell*, 356 U.S. 44

III

Section 352 imposes expatriation as a penalty without the safeguards guaranteed by the Fifth and Sixth Amendments. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144. Since Congress has assumed that a naturalized citizen who resides abroad for the stated period of time has abandoned his allegiance to his adopted country, a naturalized citizen coming within the scope of the statute stands convicted of disloyalty and is punished by forefeiture of his citizenship. He is given no hearing, no specific charges, no chance to defend himself against the allegation of disloyalty. He is punished without trial.

IV

Even if the section was considered to be regulatory rather than penal, it fails to meet the due process requirements of the Fifth Amendment because it is based on a conclusive presumption that naturalized citizens residing abroad have abandoned their allegiance to the United States. This presumption is not only clearly arbitrary in substance, but it also takes away a most valuable right without giving the citizen the opportunity to defend himself against the presumption of dis-

loyalty in accordance with the procedural standards of fair hearing required by the due process clause of the Fifth Amendment.

V

The penalty of loss of citizenship imposed by Section 352 constitutes a cruel and unusual punishment within the meaning of the Eighth Amendment. *Trop* v. *Dulles*, 356 U.S. 86.

ARGUMENT

I. SECTION 352 ARBITRARILY DISCRIMINATES AGAINST NATURALIZED CITIZENS IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS

This case marks the first time that this Court is presented with a question involving the constitutionality of a statute containing a substantive discrimination between native-born and naturalized citizens of the United States.

The reason that this Court has never had any occasion to rule on any such discrimination in the past is that this is the first and only substantive discrimination between native-born and naturalized citizens Congress has ever attempted. The provision is a new one. It first became part of our law with the passage of the Nationality Act of 1940, 54 Stat. 1170.

The challanged legislation (now Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484) purports *automatically* to deprive naturalized citizens of their nationality because of continuous residence in the territory of a foreign state, either the state of origin where the period is three years, or any foreign state where the period is five years.

No comparable provision applies to native-born citizens. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship.

Sections 353 and 354 of the Act (8 U.S.C. §§ 1485 and 1486) contain a list of exemptions from the discriminatory deprivation of citizenship embodied in Section 352. The exemptions are detailed. They are applied by the Congress as a matter of grace defining, as a matter of policy, which groups of naturalized citizens shall be exempted from the general prohibition of long-time residence abroad applicable to the remaining body of naturalized citizens on pain of loss of citizenship. No such prohibition and no such limitation is applied to their fellow citizens who obtained their citizenship by birth.

It is appellant's position that the discriminatory and arbitrary denial of citizenship to one class of Americans under Section 352 violates the Fifth Amendment's prohibition against depriving any person of life, liberty or property without due process of law. The discrimination is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

This discriminatory aspect of the challenged statute was the "chief basis" for the dissent below by Judge Fahy. (R. 60), 218 F. Supp. at 319.

The discrimination plainly limits the rights of naturalized citizens to live and work abroad in a way that is not applied to native-born citizens. It creates, a second-class citizenship. The statute is an assertion by Congress of the power to control and restrict the rights of that great class of citizens who acquired their citizenship by naturalization to live, work and

marry where they please, while other citizens are free from such restraints.

As we shall show below, this relegation of naturalized citizens to a second-class citizenship status is completely contrary to the principle of equality of all citizens regardless of the manner in which they acquired their citizenship, as clearly expressed in the Constitution and in the decisions of this Court. This second-class citizenship status is based on the arbitrary, invidious and constitutionally impermissible assumption that naturalized citizens, as a class, are less reliable and bear less allegiance to this country than do the native-born.

This broad discrimination against all naturalized citizens cannot, as we shall further show, be sustained as an exercise of the foreign affairs power or any other power granted to Congress. Nor is there any rational justification under the foreign affairs power for the severe inequality of treatment created by the statute which takes away from naturalized citizens who reside abroad the most precious right of citizenship, but leaves the native-born free to reside abroad for any length of time without the slightest adverse consequence.

This discrimination cannot be squared with the Fifth Amendment to the Constitution.

A. The Discrimination as It Affects Appellant

If appellant were a native-born citizen, she would be perfectly free to live abroad with her husband without losing her citizenship. However, if the challenged legislation is valid, Angelika Schneider, as a naturalized citizen, after a period of three years residence abroad must choose between giving up her American citizenship or abandoning her marital obligation to stay with her husband at his foreign residence.

As Judge Fahy stated in his dissenting opinion below:

> "* * * she is put to the choice of abandoning either her husband or her nationality. No comparable choice is required of a national born on American soil who lives abroad in like circumstances." (R. 65), 218 F. Supp. at 321.

A native-born woman can live with her husband abroad and yet retain her American citizenship simply because she desires to retain her identity as an American. Angelika Schneider, as a naturalized citizen, under the statute, is automatically stripped of her American citizenship contrary to her intentions, her feelings and her political allegiance.

Appellant came to the United States when she was not quite five years of age (R. 2, 9, 17). She attended grade school and high school in suburbs of New York, and obtained her college education at Smith College (R. 2, 9). As a natural result of her education in the American schools and spending the years of her principal development in the United States, appellant is thoroughly American, and is attached to the United States. She is familiar with our system of constitutional government and personal rights, and any other government is necessarily foreign to her. She "regards" herself "as an American, and has no political loyalty or allegiance to either Germany or any other country except the United States." (R. 9). Her affidavit in these proceedings shows why she regards herself as an American and why she desires to retain her citizenship with the only country which has her allegiance. We quote:

> "4. I feel myself an American and I value my American citizenship highly. Practically all my

relatives, except my husband and children, live in the United States and are American citizens. These include two brothers, a half brother and sister. (R. 7)

"5. I regard the United States as my country. I have had all my schooling (grade school, high school and college) in the United States except for some post-graduate work in Switzerland and France." (R. 7-8)

* * *

"8. I regard myself as an American. I have spent my entire childhood and youth in the United States and regard it as my country. From the time I was five until I came to Germany in 1956 to be married, I had been in Germany only briefly in 1954 and 1955 travelling through and have neither felt nor had any connection with that country. I have no political loyalty or allegiance to either Germany or any other country except the United States." (R. 9)

* * *

"6. * * * Instead, as a result of the action of the State Department in taking away my passport and my naturalization certificate, I am faced with a choice of giving up my husband and family life with him, or of being forced to give up my country. I do not wish to accept either alternative. I wish to be an American citizen which I feel myself to be and also to remain with my husband and our children in Germany where he practices his profession." (R. 8)

* * *

"22. I understand that the statutes involved apparently require the results reached by the State Department. I cannot believe, however, that the Constitution of the United States permits me to be faced with the cruel choice of surrending either my family or my country. I have, accordingly, directed the institution of the necessary

> proceedings to establish what I believe to be the true and just conclusion that I, although naturalized, have the same freedom as any American girl who received her citizenship by birth to marry where I please and to live with my husband and family without giving up my American citizenship." (R. 12)

There is nothing to distinguish appellant from any other American girl who resides with her husband abroad except the fact of her birth in Germany. Under Section 352, however, this fact alone operates automatically to deprive petitioner of her American citizenship.

Because of this provision petitioner now lives in Germany as a stateless person (R. 8). After having been raised here and under our institutions, she finds herself abandoned by her country, and subject to the mercy of governments in Germany or elsewhere, wherever she may be, whom she regards as alien.

The District Court did not question appellant's statement that she is an "American by training in thought and in feeling, and that she values highly her American citizenship." The Court, however, states that:

> ". . . these sentiments, however sincere, were not conducive to her retention of residence in the United States." (R. 53), 218 F. Supp. at 315.[1a]

[1a] As Judge Fahy, in his dissenting opinion (R. 65), n. 10, 218 F. Supp. at 321, commented with respect to this statement:

> ". . . But Congress has not indicated in the legislation under consideration that its purpose was to keep Americans at home, but rather to promote the smooth working of our foreign relations. Furthermore, we must not confuse the problem in this case with the problem of fraudulent acquisition of citizenship, separately dealt with under the 1940 legislation."

The District Court here clearly pinpoints the discriminatory character of the legislation. Naturalized citizens are required to reside in the United States, and if they do not do so, are deprived of their citizenship, regardless of their allegiance to this country. Native-born citizens are free to reside where they please, and will not lose their citizenship no matter how long they reside abroad or how tenuous their ties to this country may be.

B. The Discriminatory Statute Takes Away Citizenship Validly Secured in Good Faith With the Intent to Reside Permanently in the United States

Section 352 operates to take away American citizenship acquired in good faith with the required intention to reside permanently in the United States. It is applicable independently of the good faith of the naturalization and applies to all naturalized citizens irrespective of their intentions at the time of naturalization. It does not purport to challenge and relate back to the original naturalization. Instead it proceeds on the theory that a validly naturalized citizen can be deprived of his citizenship, if he takes up foreign residence many years after naturalization and on account of circumstances completely unforeseeable at the time of naturalization. This is plainly demonstrated by the present case. There is in this case no question of petitioner's bona fide intention to reside permanently in the United States at the time of her acquisition of citizenship, nor has the Government or the District Court so suggested. Appellant was naturalized in 1950 at the age of sixteen, having resided in the United States since 1939 (R. 9, 17). At the time she acquired her citizenship she had just graduated from high school and was beginning her freshman year at Smith college

(R. 9). She could not have known or suspected that years later she would meet and marry Dr. Schneider and live with him in Germany.

Yet the statute seeks to take away citizenship acquired in good faith, on the basis of events not contemplated or foreseeable. If sought to be sustained as an attack on the original naturalization, it would clearly be arbitrary. *Cf. Bailey* v. *Alabama*, 219 U.S. 219; *Tot* v. *United States*, 319 U.S. 463; *Heiner* v. *Donnan*, 285 U.S. 312.

The entirely different problem of the alien who acquires American citizenship with no intention to make the United States his home, but only for the purpose of receiving the advantages of an American passport or American diplomatic protection is adequately covered by another provision of the Act.

Section 340(d) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1451(d), meets this problem by establishing a rebuttable presumption that a naturalized citizen who, within five years of his naturalization, returns to his country of origin, or goes to any other foreign country, lacked the required intention to reside permanently in the United States at the time he applied for naturalization. If this presumption is not rebutted the naturalization may be set aside as having been acquired by fraud.[2]

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[2] Section 340(d), 8 U.S.C. § 1451(d), originally enacted as a part of the Naturalization Act of 1906, 34 Stat. 596, reads in pertinent part as follows:

> "If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing

This Court in *Luria* v. *United States*, 231 U.S. 9 sustained this provision, as embodied in an earlier Act, as a proper exercise of the naturalization power. This Court warned, however, this presumption, if unreasonably applied, could deprive naturalized citizens of their constitutional rights. In *Luria* this Court stated, 231 U.S. at 27:

> "* * * But we are of the opinion as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to acquire but slight countervailing evidence to overcome it . . . So construed we think the provision is not an excess of the power of Congress."

Section 352, since it operates to deprive validly naturalized citizens of their citizenship and does not challenge or relate back to the original naturalization, cannot, as was the presumption in *Luria*, be sustained as a proper exercise of naturalization power.[3]

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his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . . ."

[3] While the Government has not attempted to sustain Section 352 as an exercise of the naturalization power the legislative history of the 1940 Act indicates that the provisions now contained in Section 352 were erroneously sought to be justified as a proper exercise of the naturalization power designed to expatriate persons who acquired United States citizenship without ever having had the required intention to reside permanently in the United States.

Thus, for example, the Cabinet Committee which recommended passage of the Act observed:

C. The Discrimination Creates a Second-Class Citizenship and Is Invidious in Its Nature

The discrimination between naturalized and native-born citizens contained in Section 352 could not be sustained under the Constitution even assuming *arguendo* that it could be rationally justified as tending to extend some legitimate Congressional objectives.

This is because: (1) The effect of "these provisions for loss of nationality, limited to naturalized citizens," is to "create a second class citizenship status"[4] for naturalized citizens; (2) This second class citizenship status is premised on the theory that naturalized citizens as a class are less loyal to this country than the native-born.

"The admission of an alien to the privilege of American citizenship is subject to the condition that he intend to reside permanently in the United States and perform the duty of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the State of which he was formerly a national, definite termination of his American citizenship should follow." (Nationality Law of the United States (1938), part 1, House Committee Print, 76th Cong., 1st Sess., p. 70.)

Mr. Flournoy, Assistant Legal Advisor of the Department of State similarly stated:

"I do not know why a person who obtained naturalization upon a statement under oath that he intends to reside permanently in the United States should retain citizenship if he goes and lives for some long period even in a third country. Of course, the cases that give us most trouble are those cases of persons who go back to their native land * * *" (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 141 (1940)).

[4] Report of the President's Commission on Immigration and Naturalization, *Whom We Shall Welcome*, 1953: p. 239.

A second class citizenship status based on the mode of acquisition of citizenship is unprecedented and contrary to established constitutional principles. It is clearly not permitted under the Constitution where, as here, the second class citizenship is imposed on the basis of an invidious discrimination against citizens of foreign birth. Such classifications of citizens on the basis of birth of national origin are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100.[5]

1. The Second Class Citizenship Status Created By the Statute

Section 352 creates two classes of citizens. The native-born is free to reside abroad for any length of time and for any purpose regardless of allegiance and regardless of whether such residence may give rise to any foreign affairs problems. Naturalized citizens, on the other hand, have a citizenship which is conditioned upon their continued residence in the United States. As demonstrated by the facts of this case, naturalized citizens lose their citizenship by residing abroad even though they retain their allegiance to the United States, and their residence abroad gives no rise to any foreign affairs problems.

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[5] President Lyndon Johnson in his State of the Union Message on January 9, 1964 stated:

> "We must also lift by legislation the bars of discrimination against those who seek entry into our country, particularly those with much needed skills and those joining their families. In establishing preferences, a nation that was built by the immigrants of all lands can ask those who now seek admission: What can you do for our country? *But we should not be asking: In what country were you born?*" (Emphasis supplied)

Under Section 352, as we have seen (1(B) above), it is not enough that a naturalized citizen had the required intention to reside in the United States at the time he acquired his citizenship. After he acquires his citizenship, he is obliged to reside in the United States if he wishes to retain his citizenship unless he comes within one of the exceptions which Congress as a matter of grace has provided in Sections 353 and 354 of the Act. It makes the citizenship of naturalized citizens conditional upon residence, while the citizenship of the native-born is subject to no such condition. The legislative history makes it quite clear that it was just such a condition on citizenship acquired by naturalization which the legislation was intended to impose. As the Cabinet Committee recommending the legislation stated:

> "... before an alien is admitted to the privilege of citizenship, under the laws of the United States, he is required to declare under oath that he intends to reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted." (Nationality Laws of the United States, (1938), part 1, House Committee Print, 76th Cong., 1st Sess. p. 70).[4]

The challenged legislation is an assertion by Congress of the power to limit and condition the rights of naturalized citizens; to create a type of citizenship subject to restrictions which are not and presumably could not be imposed on the native-born.

It is an assertion of a right which, if sustained, cannot be limited by the present scope of the statute and its exemptions. It is, in substance, a claim of right on

[4] See also material quoted in note 3.

the part of the Congress to say to naturalized citizens that they have no right to travel or remain outside the borders of the United States except under terms and conditions which Congress, as a matter of grace, may allow, while no such limitation is made on their fellow citizens who owe their citizenship to birth.[7]

Indeed, Congress could not impose a similar control over the residence abroad of citizens generally.

Travel, which of course includes the right to remain abroad for any legitimate purpose, is a fundamental aspect of the personal liberty protected by the due process clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116, 125-128. In *Kent*, this Court stated (357 U.S. at 126):

> "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as

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[7] One irony of the terms and conditions presently in force is that appellant, by reason of her more than 15 years residence in the United States, was free to marry and live abroad without loss of citizenshih provided it was not in Germany. See 73 Stat. 274, 8 U.S.C.A. § 1486(5), exempting 15-year residents from the 5-year limitation on residence in countries other than the country of birth but not from the 3-year limitation on residence in the country of origin. Had appellant married an Austrian, a Swiss, or even a resident of Communist China, she could have lived with her husband in any of these countries secure in her American citizenship for life.

We do not here quarrel with the line which Congress has chosen to draw, however absurd it may seem on its face. We use it only to emphasize that in asserting the power to draw any line based on residence abroad, Congress is asserting a general power to restrict or forbid travel or residence abroad and that its exemption or failure to exempt from the penalty of loss of citizenship is solely a matter of grace.

> the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . ."

This Court then quoted at length from Professor Chafee's explanation of the extent of that liberty, citing in particular "reasons close to the core of personal life—*marriage*, reuniting families, spending hours with old friends." (*Ibid.*, emphasis supplied).

The only basis for the restrictions which Section 352 imposes on the naturalized citizen is that the naturalized citizen possesses a class of citizenship which may be made subject to special restrictions.

The Constitution, however, does not empower Congress to create different classes of citizenship. Under the Constitution, there is only one citizenship of the United States. Persons may, of course, acquire citizenship by different means. A person may be born a citizen of the United States, or obtain citizenship through naturalization. Congress may, of course, pass laws stating under what circumstances citizenship is acquired by birth (Section 301 of the Immigration and Nationality Act of 1952, 8 U.S.C., § 1401) and may, as the Constitution expressly provides, "establish a uniform Rule of Naturalization" (Constitution, Art. 1, Section 8, Cl. 4). A person who claims to be a native-born citizen may be denied the rights of citizenship and even deported upon judicial determination that his claim of citizenship is false. *Ng Fung Ho* v. *White*, 259 U.S. 276, 281-284. Similarly, the citizenship of a person who was naturalized by making a false statement on his application for naturalization may be revoked by judicial action. Section 340 (d) of the Act, 8 U.S.C. Section 1451(d), *Luria* v. *United States*, 231 U.S. 9.

However, once a person has validly become a citizen of the United States, be it by birth or by naturalization, his rights as a citizen are the same as those of every other citizen. Congress cannot create a class of citizens whose rights or obligations are greater or less than those of other citizens.

This principle of equality between native-born and naturalized citizens has been clearly expressed in the opinions of this Court.

The classic formulation of this principle is found in the opinion of Chief Justice Marshall in *Osborn* v. *The Bank of the United States,* 22 U.S. (9 Wheat.) 738, 827-828:

> "A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might use. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none."

See also *United States* v. *Wong Kim Ark,* 169 U.S. 649.

Nearly a century later this Court said in *Luria* v. *United States*, 231 U.S. 9, 21

> "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respect, save only that of eligibility to the presidency."

For similar but more recent statements, see *United States* v. *MacIntosh*, 283 U.S. 605, 624; *Knauer* v. *United States*, 328 U.S. 654, 658).[8]

Moreover, this principle of equality is also clear from the plain language of the Fourteenth Amendment to the Constitution which provides without any distinction for the citizenship of

> "All persons *born or naturalized* in the United States . . . ." (emphasis supplied)

As Judge Fahy stated in his dissenting opinion below (R. 64), 218 F. Supp. at 320:

> "The inequality in treatment arises after American nationality has been conferred. This is contrary to the general policy of our laws to maintain equality in the status of citizens. A difference which antedates naturalization may not readily be revived after citizenship is acquired and by such revival create a more vulnerable type of citizenship than is possessed by the native born."

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[8] See also the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, 356 U.S. 44, 56, where he states:

> ". . . of course, naturalization unlawfully procured may be set aside. But apart from this circumstance the status of the naturalized citizens is secure."

And the concurring opinion of Mr. Justice Douglas in *United States* v. *Minker*, 350 U.S. 179, 197:

> "The citizenship of naturalized persons has the same dignity and status as the citizenship of those born here, save only for eligibility for the Presidency."

Section 352 marks the first attempt by Congress to depart from the firmly established constitutional principle of equality between native-born and naturalized citizens.

This discrimination in Section 352, which first became part of our law with the passage of the Nationality Act of 1940, is the *first* and *only* discrimination between native-born and naturalized that Congress has ever attempted. It is the single substantive exception to the deeply rooted principle that native-born and naturalized citizens are equal in every respect (with the single exception of the constitutional provision limiting the Presidency of the United States to the native-born.) See *Luria* v. *United States, supra,* 231 U.S. 9, 21.

A prior distinction between native-born and naturalized citizens appears in the Act of March 2, 1907, 34 Stat. 1228, but it was a procedural not a substantive one.* The 1907 Act provided that if a naturalized citizen resided for two years in a foreign state from which he came or five years in another foreign state, a presumption would arise that he had voluntarily

* Act of March 2, 1907, 34 Stat. 1228:

"Sec. 2.

. . .

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided*, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State many prescribe; *And provided also*, that no American citizen shall be allowed to expatriate himself when this country is at war."

abandoned his citizenship. Under this statute such a presumption could be overcome "by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States." It was, as this Court stated in *United States* v. *Gay*, 264 U.S. 353, 358, "a presumption easy to preclude, and easy to overcome. It is a matter of option and intent." This Act was nothing more than a requirement to state clearly an intention to continue allegiance to the United States. Furthermore, even in a case where the presumption should prevail, the effect, according to a ruling made by Attorney General Wickersham, 28 Op. Attny. Gen. 504 (1910), was only loss of diplomatic protection and not an actual loss of citizenship. Indeed, the Act had no application to a citizen who returned to the United States no matter how long he had stayed abroad. *Ibid.*

Thus the 1907 Act provided only a yardstick for voluntary and intentional expatriation. It imposed on the naturalized citizen residing abroad only the burden of avowing his continued allegiance to the United States. It did not deprive loyal American citizens of their citizenship on grounds of mere residence abroad. *United States* v. *Gay, supra.* See also *Miller* v. *Sinjen*, 289 F. 388 (8th Cir. 1923); *Camarado* v. *Tillinghast*, 29 F.2d 527 (1st Cir. 1928); *United States* v. *Eliasen*, 11 F.2d 785 (W.D. Wash. 1926).

The challenged legislation for the first time in our history makes naturalized citizens subject to special conditions and restrictions of a substantive nature. If the statute is upheld, it will make naturalized citizens nothing more than citizens on probation, not entitled to the full rights of American citizenship enjoyed by the native-born. It would relegate naturalized citi-

zens to a second-class citizen status. Such a result would be plainly contrary to the plain meaning and spirit of the Constitution as it has been construed by this Court.

2. Invidious Nature of the Discrimination

The second-class citizen status for naturalized citizens created by Section 352 also cannot pass muster under the Constitution because it is based on the theory that naturalized citizens as a class are less reliable than the native-born and more likely to abandon their allegiance to this country.

Classifications of citizens on the basis of birth or national origin "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and are suspect even when justified by the most extreme wartime emergency. *Hirabayashi* v. *United States, supra,* 320 U.S. 81, 100.

It is appellant's position that under no circumstances can Congress make, by a general law applicable in times of peace as well as emergency, invidious discriminations between citizens which result in the creation of "second-class citizenship" for some. Yet this is the unequivocal result of Section 352.

The legislative history, as demonstrated under (I)(D)(1) below, clearly shows that Section 352 was premised on the theory that naturalized citizens who reside abroad are as a class "nominal citizens" who for all intents and purpose may be assumed to have abandoned their allegiance to this country. No similar derrogatory assumption is, of course, made with respect to native-born citizens residing abroad.

The invidious nature of this discrimination becomes even more clearly evident from the exemptions for

which to a very limited extent have softened the broad sweep of Section 352. These exemptions indicate perhaps better than anything else that these provisions presuppose an inferior status on the part of the naturalized citizens. Under these exemptions a naturalized citizen can earn the right to reside abroad, a right held by every native-born citizen, if, for example, he is a veteran of the Spanish American War, World I, World War II or the Korean War, Section 354(1), receives a compensation from the Government of the United States on account of a disability incurred in Government service, Section 353(2), or does work which "in the opinion of the Secretary of State directly benefits trade or commerce." Section 354(2).

Under these exemptions a naturalized citizen is granted, as a matter of grace, as a special reward or upon establishing special merit, the right to be treated equally with and to be considered as reliable as a native-born citizen.

Accordingly, it is the clear premise of this legislation that naturalized citizens as a group may be assumed to lack allegiance to the United States unless they escape from this inferior category of citizens, by qualifying under one of the exemptions referred to above.

Congress, we submit, may never enact legislation to restrict a group of citizens on a discriminatory basis on the theory that one group of citizens—*as a group*—are more likely to lack allegiance to the United States than another.

Such group legislation, particularly when based on national origin, is simply not permitted by the Constitution. Such group legislation may of course be

more simple to administer. But our Constitution, protects personal rights and does not allow Congress or the Government the administrative convenience of such legislation. Congress may not restrict the rights of a group of citizens on the basis of such factors as race, ancestry or national origin. Even if it were proved that such a group were more prone to involvement in certain problems than other groups, Congress must deal directly with the act which it considers evil and not with the group which it believes may be more likely to commit such an act. Otherwise it would no doubt be possible to justify many classifications between groups of citizens on a so-called "rational" basis. No doubt evidence could be presented showing that certain characteristics or propensities exist more among citizens of certain national origins than others. This, however, does not mean that Congress may base legislation on the basis of such factors. So far as Congress is concerned, such factors under our system of Government, are and must be completely irrelevant.[10]

The Congress has no power to segment and compartmentalize the citizenry and regulate them on the basis of assumed characteristics or tendencies of their race, religion, national origin or economic class. It must apply the same consequences to the same act whether or not, *a priori* or even on the basis of past conduct substantiated by statistics, it was more likely to be com-

[10] The absurdities of the contrary approach here suggested by the Government are endless, *e.g.*, since experience teachs that those guilty of petty larceney are most often poor, and those guilty of violations of the antitrust laws are most often not poor presumably a rebuttable or conclusive presumption could be applied to persons charged with such crimes depending only on proof of their economic status. This would certainly eliminate administrative inconvenience and would avoid trials which are "cumbersome, long-drawn out and expensive to the Government." See I(D)(1).

mitted by a Jew, a Catholic, a Negro or a naturalized citizen, or indeed a poor man or a rich man.

The District Court has been able to cite only a single case where this Court has upheld a discrimination based on a factor such as national origin. *Hirabayashi* v. *United States, supra,* 320 U.S. 81.[11] There the classification, as the Court expressly stated, was upheld only because of the existence of war and the imminent threat of invasion. In *Hirabayashi,* 320 U.S. at 100, this Court said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."

The problems asserted to attend the residence abroad of naturalized citizens cannot be even remotely compared with the threat of immihent invasion. Yet short of such an imminent danger it is clear that the classification of persons on such a basis as foreign birth is prohibited under our Constitution.

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[11] The other cases relied on by the District Court did not involve any classification on a basis of national origin. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895, involved no classification of any kind. *McKenzie* v. *Hare,* 239 U.S. 299, *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 and *Hoyt* v. *Florida,* 368 U.S. 57 all involved different treatment of men and women.

D. Discrimination Cannot Be Justified as a Proper Exercise of the Foreign Affairs Power as There Is No Rational Nexus Between the Discrimination and That Power

The District Court held that the discrimination involved in Section 352 may be justified as a proper exercise of Congress' foreign affairs power.

As shown above, it is our position that the discrimination between native-born and naturalized citizens, which Congress has attempted, is not permissible even if it would assist in the conduct of the foreign affairs of the United States.

In any event, however, the discrimination embodied in Section 352 cannot be justified as an exercise of the foreign affairs power.

"The means—in this case withdrawal of citizenship" of naturalized citizens *on a discriminatory basis*—is not "reasonably related to the end—here, regulation of foreign affairs." *Perez* v. *Brownell,* 356 U.S. at 58.

The required rational nexus is lacking here because the mere residence abroad of naturalized citizens has not been indicated to give rise to any problems relating to the conduct of foreign affairs which could justify the restrictions imposed broadly on naturalized citizens.

Even assuming, however, that Congress reasonably concluded that foreign affairs problems were more likely to arise from residence abroad of naturalized citizens, the means Congress has selected, the discriminatory deprivation of the "most precious right of citizenship," *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 159, is clearly out of all proportion to any possible problems which might be raised by residence abroad of naturalized citizens.

1. The Administrative Convention of the Discrimination as Compared to Determination of Allegiance on an Individual Basis Cannot Justify the Legislation

The real purpose of Congress in enacting this legislation was to take away the citizenship of naturalized citizens who reside abroad, not because of any special foreign affairs problems caused by such residence, but because it concluded that naturalized citizens residing abroad may, as a group, be assumed to be only nominal citizens. Therefore, the Congress felt that it was not worth the effort of the Government (1) to provide naturalized citizens residing abroad with diplomatic protection and other benefits of American citizenship or (2) even to determine on a case by case basis whether an individual naturalized citizen had in fact abandoned his allegiance to this country.

This purpose is clearly reflected in the legislative history.

Thus, for example, Chairman Dickstein of the House Committee said that the bill would

> "relieve this country of the responsibility of those who reside in foreign lands and *only claim citizenship when it serves their purpose.*" (86 Cong. Rec. 11944). (Emphasis supplied)[12]

Congressman Rees, stated, 86 Cong. Rec. 11948, that naturalized citizens residing abroad are "not likely to have any real attachment to the principles of the Constitution of the United States."

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[12] The Congressman meant, of course, citizens who claimed rights, but refused responsibility. Of course, citizens who have not failed in their allegiance have a right to claim citizenship and the protection of the Government "when it serves their purpose."

The Senate report on the bill has stated (S. Rep. No. 2150, 76th Cong., 3d Sess., p. 4):

> "These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State *nominal citizens* of this country who are abroad *but whose real interests, as shown by the conditions of their foreign stay, are not in this country.*" (Emphasis supplied)

Similarly, the Cabinet Committee Report, Nationality Laws of the United States, *supra*, p. 71, stated:

> "Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated."

Furthermore, the Cabinet Committee, which proposed the challenged legislation, cited thirteen cases as typical of the problems with which the statute should deal. Nationality Laws of the United States, *supra*, 72-75. None of these cases involved any alleged difficulties with foreign countries resulting from the fact that the naturalized citizen was residing in his country of origin. All of them were merely cases of protracted residence abroad, and most involved a breaking of all ties with this country.

The Cabinet Committee expressly rejected a determination of continued allegiance to the United States on an individual basis. It did so because such a deter-

mination would represent administrative difficulties, and because "proceedings in the courts would be cumbersome, long-drawn out and expensive to the Government. . . ." Nationality Laws of the United States, 1938, *supra*, p. 70. Judge Fahy in his dissenting opinion refers to this administrative convenience as "the principal basis advanced for the remedy." (R. 59), 218 F. Supp. at 318.

Accordingly, the legislation appears to have been enacted not, as the District Court believed, to deal with a special source of friction between the United States and other countries, but as a matter of administrative convenience to the Department of State in dealing with citizens residing abroad who have no allegiance to this country.[13]

The legislation clearly cannot be sustained on such grounds. As Judge Fahy stated in his dissenting opinion, such legislation "would seem to call for justification under the foreign relations power by some

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[13] The Cabinet Committee report relied on by the District Court (R. 44), 218 F. Supp. 309-310 also states that

> "• • • a definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalized citizens to conclude such treaties and to recognize the American nationality of the persons concerned when they return to their countries of origin for legitimate objects and for residence of a temporary character." (Nationality Laws of the United States, *supra* p. 71.)

The legislative history does not mention, however, any incidents where foreign states refused to recognize American naturalized citizens. None of the thirteen typical cases presented to Congress involved such a refusal. Nor does the legislative history indicate that this was the problem with which Congress was concerned in enacting this legislation. Furthermore, the United States does not appear to have entered into any naturalization treaties since the enactment of this legislation.

more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived." (R. 63), 218 F. Supp. at 320.

Moreover, as shown under I(C)(2) above, the Constitution does not permit Congress to legislate on the assumption that naturalized citizens are the class more likely to abandon their allegiance than the native-born.

In addition, this assumption on which this legislation is based is unsubstantiated, entirely without any basis, and plainly cannot justify the discrimination.

Naturalized citizens who, years after their naturalization, take residence in the state of their former nationality, or in some other state, for family, health or business reasons unforseeable at the time of their naturalization, generally do so without in the slightest way surrendering their identity as Americans. Such residence abroad does not mean or imply reversion of the naturalized citizen to his former allegiance. Indeed, a naturalized American citizen who made the deliberate choice to become an American citizen may be expected to be as proud of his American citizenship and as insistent on retaining his identity as an American as a native-born citizen who holds his citizenship by the accident of birth. Naturalized Americans abroad by reason of their understanding of the customs and language of their native countries may, in fact, be the best representatives of this country and interpreters of the virtues of its institutions. Nor need one elaborate the point that in the present state of international affairs such interpreters should be encouraged and not repudiated.

Nor, particularly in these days of fast and low cost international travel, does residence abroad carry with

it a rupture of the ties with this country. A person may reside in a foreign country yet make regular visits in the United States to keep intact contacts with family, friends and country. But regular visits to this country (even if frequent) do not protect a naturalized citizen from loss of citizenship as a result of residence abroad for the stated periods. In Section 101(a)(33) of the Act the term "residence" is defined as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of Section 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

Thus, a naturalized citizen will lose his citizenship under Section 352 even though he comes to his country regularly from his place of abode elsewhere.

That a naturalized citizen by residing abroad cannot be assumed to have abandoned for all intents and purposes his American citizenship and broken his ties with his country will be evident from the facts of this case. Appellant resides in Germany only because she is married to a husband who practices his profession there. (R. 10). Appellant left Germany when she was at the age of four. That she took up residence there many years later for a purpose plainly not contemplated when she left as a child, or when she was naturalized as a school girl, does not mean that she has in effect abandoned her allegiance and interests in the United States any more than in the case of a native-born who marries a nonresident. (R. 9) To the contrary, as

she stated in her affidavit filed in support of her motion for summary judgment, appellant feels herself as an American and wishes to retain her American citizenship. (R. 7-9) Nor does appellant's residence in Germany mean that she has disrupted her ties with her relatives, practically all of whom live in the United States (R. 7), and with friends she made during her long years of schooling and residence here. (R. 9) Appellant's ties with the United States remain in being the same as those of any other American woman who happened to be married to a husband who practices his business or profession abroad. As is typical for most Americans who, for marriage or other reasons must reside abroad, appellant visited this country for six weeks in 1957 to show her first-born son to her relatives and friends.[14]

Unquestionably the person who resides abroad as an American citizen, but who has no allegiance to the United States, represents a problem with which Congress may deal. To deal with this problem Congress has attached expatriation to certain acts demonstrative of lack of allegiance to the United States whether they be performed by native-born or naturalized citizens. (Section 349 of the Act). Other similar measures may be possible. It is clear, however, that this problem cannot be dealt with by depriving naturalized citizens who reside abroad of their citizenship regardless of the allegiance to the United States on the theory that naturalized citizens who reside abroad may be assumed as a group not to have allegiance to the United States.

[14] Although it is not in the record, appellant came here again in 1960 after the Department of State had determined she had lost her citizenship. She came here on a visit with papers that stamped her as a stateless person.

Furthermore, it is clear that the problem of the American citizen residing abroad who has in effect abandoned his allegiance to the United States is not one which is limited to naturalized citizens. Indeed, there is nothing in the legislative history to show that this is a problem which is more prevalent among naturalized citizens residing abroad than among native-born expatriates.

2. Congress Was Required to Deal With the Limited Problems Presented by More Limited Legislation

Neither the legislative history or the Government in its earlier briefs points to any problem relating to the mere residence abroad of naturalized citizens which might serve as a justification for this broad legislation affecting the rights of all naturalized citizens.

The problems which have been indicated are all special and limited problems generally not attending the residence abroad of naturalized citizens. They do so only when such residence is accompanied by other factors such as dual nationality and refusal of a foreign state to recognize American naturalization. See I(D)(4) and I(D)(5) below. Such problems, however, are not involved in the residence abroad of the appellant or of the vast number of other naturalized Americans who reside abroad. It has not been shown that any problems caused by residence abroad of naturalized citizens, when such residence is accompanied by added factors which may result in embarrassment, cannot be dealt with by specific legislation direction to these particular problems.

Of course, Congress has the authority under its foreign affairs power to enact regulatory measures designed to avoid international frictions. 'Its measures,

however, must be appropriately limited to those difficulties. In the present case, unlike *Perez* v. *Brownell*, 356 U.S. 44 "The classification Congress has adopted" is entirely "inappropriate to the difficulties to be dealt with." 365 U.S. at 59. A statute can not expatriate citizens on the basis of foreign residence where it is not the foreign residence itself which causes difficulties but some particular conduct or some situation applicable to particular persons or groups of persons. *Bailey* v. *Alabama*, 219 U.S. 219, *Tot* v. *United States*, 319 U.S. 463, *Heiner* v. *Donnan*, 285 U.S. 312. It can hardly be said that the problems caused by residence abroad when accompanied by such added factors cannot be met more discretly. As shown below, it is clear that such problems as dual nationality or the refusal of a foreign state to recognize American naturalization could be dealt with by specific and more limited legislation.

Congress did not even consider alternate, more limited means to deal with any such problems. It is incumbent upon the legislature however to act with an adequate regard for the vital interest at stake and the alternative methods of achieving the purposes of its legislation. See *Dean Milk Co.* v. *City of Madison*, 340 U.S. 249. It plainly has not done so here. Equally plainly there has been no valid exercise of foreign affairs power.

3. Even Assuming Some Classification Might Be Justified, There Is No Reasonable Basis for the Severe Inequality of Treatment Imposed by Section 352

Even if we assume that there is a reasonable basis for Congress to conclude that a naturalized citizen is more likely than the native-born to embarrass the United States in the conduct of foreign affairs, though

both live in the same foreign state for the same length of time and one bears no greater allegiance to the United States than the other, it is clear that there is no rational basis for the severe inequality of treatment Congress has imposed.

As Judge Fahy stated in his dissenting opinion below (R. 66), 218 F. Supp. at 322:

> "The difference and degree of embarrassment, if any, is not shown to be substantial enough to warrant so great a difference in the consequence meted out only to the naturalized citizen. Constitutional power should not be overextended so as to deprive plaintiff of a fundamental liberty upon so tenuous a basis."

Stated in other words, even assuming a reasonable justification may be made for different treatment of native-born and naturalized citizens for some purposes, this "does not justify the law in imposing an inequality among citizens out of proportion to the purpose for which the classification is made." (Dissenting opinion of Judge Fahy (R. 66), 218 F. Supp. at 321-322).

Denationalization, as this Court has repeatedly recognized, is an extremely harsh remedy. In *Trop* v. *Dulles, supra,* this Court held expatriation to constitute a cruel and unusual punishment. As the Chief Justice stated in that case, it results in "the total destruction of the individual's status in organized society." 356 U.S. at 101. It has been referred to as a "truly terrifying remedy" (*Mendoza-Martinez,* 372 U.S. at 187 concurring opinion, Mr. Justice Brennan), and as "drastic measure" (*Id.,* at 214, dissenting opinion of Mr. Justice Stewart). As this Court stated in *Mendoza-Martinez,* 372 U.S. at 160 "Deprivation of

citizenship—particularly American citizenship, which is 'one of the most valuable rights in the world today' . . . has grave practical consequences." This is particularly the case where loss of citizenship, as it does here, results in statelessness. An American citizen who loses his citizenship without acquiring another becomes "a person who not only has no rights as an American citizen but no membership in any national entity whatsoever," *Id.*, at 160. He has no state which can provide him with protection and "[h]is very existence is at the sufferance of the country in which he happens to find himself. While any country may accord him some rights, no country need do so because he is stateless." *Trop* v. *Dulles*, 356 U.S. at 101-102. "The stateless person may end up shunted from nation to nation, there being no one obligated or willing to receive him . . . ." *Mendoza-Martinez*, 372 U.S. at 161.[15]

Appellant here bears the full brunt of this drastic sanction. By losing her American citizenship, she has become a stateless person living in Germany at the sufferance of that Government. She is subject to the whim of foreign officials and any change of Government or policy in Germany may threaten her status. The District Court noted that appellant could probably acquire German nationality. This she does not want to do because she feels no allegiance to Germany, the country which she fled prior to the outbreak of

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[15] Indeed, this Court has never upheld a case expatriation would have resulted in statelessness. In *Perez* v. *Brownell*, 356 U.S. 44, the petitioner was also a national of Mexico. In the only other two cases upholding expatriation a foreign citizenship was acquired as a result of the expatriating act. *Savorgnan* v. *United States*, 338 U.S. 491; *Mackenzie* v. *Hare*, 239 U.S. 229.

World War II. Even if she acquired German nationality, this could not substitute for American citizenship which has been termed " 'one of the most valuable rights in the world today' ", *Mendoza-Martinez,* 372 U.S. at 160. This is particularly true for appellant who for any number of personal or political reasons may at any time desire to return to the United States.

Under Section 352 this drastic sanction is applied to naturalized citizens who reside abroad even though their residence, as that of appellant, abroad causes no embarrassment to the United States. "On the other hand a natural-born American may safely carry his nationality abroad without losing it even if his presence proves diplomatically embarrassing in the extreme . . . ." (Dissenting opinion of Judge Fahy, R. 66), 218 F. Supp. 321.

Neither the legislative history of the Act nor the Government in its briefs have pointed to any problems serious enough to justify an "inequality of so severe a character." (Dissenting opinion, Judge Fahy, (R. 66)), 218 F. Supp. at 321. As Mr. Justice Stewart in his dissenting opinion in *Mendoza,* comparing that case with *Trop,* and quoting from Mr. Justice Brennan's concurring opinion there, stated, "the harshness of denationalization for conduct so potentially equivocal was 'an important consideration where the asserted power to expatriate has only a *slight or tenuous relationship* to the granted power.' " *Mendoza-Martinez,* 372 U.S. at 214. (emphasis added)

The slight or tenuous nature of the relationship of the discriminatory withdrawal of citizenship to the granted power is well summarized in Judge Fahy's dis-

senting opinion. He states that "the relation to or nexus with the foreign affairs of naturalized citizens"

> "(1) may exist with respect to some native-born citizens who reside abroad, and is not limited to naturalized citizens; (2) is not shown to exist in all cases of naturalized citizens whose residence abroad brings them within Section 352(a)(1); (3) appears not to have been weighed by Congress in connection with the impact of Section 352(a)(1) upon the citizenship of one group of Americans vis-a-vis another; (4) is with respect to aspects of foreign affairs which are administrative and routine in nature rather than those ordinarily associated with the authority of the Executive and of Congress to conduct the foreign affairs of the nation; (5) is largely due to problems arising from dual nationality; (6) creates problems not shown to be incapable of reasonable solution by means less drastic than the total deprivation of nationality." (R. 54), 218 F. Supp. at 315

Indeed, it is clear from the majority of opinion that the District Court was unable to find a more clear or substantial relationship between the withdrawal of citizenship and the avoidance of embarrassment in the conduct of our foreign affairs. All that the District Court was able to find was "a reasonably conceivable relation between the method used and the problem which Congress saw and sought to remedy under its foreign affairs power." (R. 53), 218 F. Supp. at 314

The discriminatory withdrawal of the citizenship of naturalized citizen can not be justified on such a "slight or tenuous" or even on a "reasonably conceivable" relationship.

As Judge Fahy stated in his dissenting opinion, (R. 66-67), 218 F. Supp. at 322:

> "Perhaps the matter can be stated more simply. The Supreme Court has held in the case of a convicted deserter that denationalization is a punishment so cruel and unusual as to violate the Eighth Amendment. The Court has also held in the case of one who leaves and remains outside the jurisdiction of the United States in time of war for the purpose of evading military service that denationalization is a punishment which, if to be upheld at all, must be accompanied by the safeguards of procedural due process of law. It would seem necessarily to follow from these decisions that in the case of the plaintiff denationalization, which is just as severe as in the two cases referred to, would create such a serious inequality among Americans upon so tenuous a basis that it fails the test of reasonableness which substantive due process requires of all legislation, especially that which restricts the liberty of the citizen. What is cruel and unusual under the Eighth Amendment for the deserter *a fortiori* is unreasonable in its solitary application to a naturalized citizen under the Due Process Clause of the Fifth Amendment."

4. Nineteenth Century Problems Arising Out of Non-Recognition of American Naturalization Neither Are Nor Could Be the Basis for This Legislation

The District Court sustained this legislation on the basis of the "long history of friction between the United States and other nations relatively to this particular class of naturalized citizens." (R. 51), 218 F. Supp. at 313.

It is our position that there is no support in either the legislative history of this particular section or in the more remote diplomatic history strongly relied on by the District Court to justify Section 352 on such a basis.

To find a justification for this legislation, the District Court refers at length to the problems involving naturalized citizens during the 19th Century. The District Court states that "The many executive utterances on this subject *throughout the 19th Century* show the magnitude of the problem." (R. 37), 218 F. Supp. at 305 (emphasis supplied).

a. *The Problems in the Nineteenth Century*

These nineteenth century problems could not form the basis for the challenged legislation. These problems had been resolved by the time this provision was made law in 1940. Nor did Congress even attempt to deal with such old problems by enacting this provision. Section 352 was, as shown above, adopted on very different grounds.

During the nineteenth century the problem which faced our Government was to secure the protection of naturalized citizens while traveling or residing in his country of origin. This problem arose out of the unwillingness of many of the European countries to recognize American naturalization. These countries held to the old dogma that allegiance can not be cast off without the consent of the sovereign. "The most vexatious cases with which this Government had to deal were those where persons, natives of states of continental Europe which maintain large standing armies, came to the United States and were naturalized, and, upon return for pleasure or business to the country of their origin, were seized and drafted into the armed services." Van Dyne, *Citizenship of the United States*, 1904, pages 283-284. To such states naturalized citizens of the United States could not travel except at serious risk.

In 1868 Congress formulated into law the policy that a citizen had a right to expatriate himself, and that the country of former nationality had no call upon a naturalized citizen's services. Act of July 27, 1868, 15 Stat. 224. This law declared that "the right of expatriation is a natural and inherent right of all people . . ." and provided in Section 2 that:

> "All naturalized citizens of the United States while in foreign countries are entitled to have and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."[16]

"The immediate occasion which called forth the law was the arrest of certain naturalized citizens by their parent countries, chiefly the German states, for nonperformance of military service and numerous arrests of naturalized citizens of Irish origin in the United Kingdom charged with crimes of political character . . . Allowing for the heat occasioned by the nature of the arrests, the action of Congress . . . was taken with deliberation and with the unanimous agreement on the principle involved, and must be considered a final expression of national policy." Citizenship of the United States, Expatriation and Protection Abroad, House Doc. No. 326, 59th Cong., 2d Sess., pp. 10-11.

b. *The Naturalization Treaties*

While United States policy that naturalized citizens should receive full protection was clear, the implementation of that policy was difficult in the light of the attitudes of some of the European countries. The United States attempted to resolve these difficul-

[16] This provision is still the law, 22 U.S.C. § 1731.

ties by entering into naturalization treaties with some of the countries which were refusing to recognize American citizenship. These treaties are called the Bancroft treaties after the United States Minister to Prussia who negotiated the first such treaty with the North German Federation in 1868. 15 Stat. 615. The purpose and background of this first such treaty appears clearly from a letter sent by Mr. Seward, the Secretary of State, to Mr. Bancroft, on August 22, 1867, 3 Moore *Digest of International Law* (1906), p. 358, where he states:

> "You are familiar with the never ending dispute between this Government and those European governments which claim to exact military service from persons born within their allegiance, but who have become naturalized citizens of the United States . . . It is in our intercourse with Prussia that the question produces the most serious inconveniences.
>
> "Soon after the close of our Civil War, Count Bismarck made some offers to the United States which were conceived in a spirit of great liberality. Your predecessor . . . was hopeful that through the negotiation thus opened, the two governments might arrive at a satisfactory conclusion of the question. It soon became apparent, however, that the United States could not surrender the principle of the absolute right of expatriation, while on the other hand Prussia was not prepared to acknowledge the principle in its full extent."

The Bancroft treaties effected a compromise between the claim of the United States that the naturalized citizens were only citizens of this country and the assertion of some of the European countries that these citizens could not escape their military obligations by acquiring American citizenship. The treaties made it

safe for naturalized citizens to reside in their country of origin for a limited period of two years. After that they might become subject to the jurisdiction the foreign power and could have no assurance of protection on the part of the United States. This was clearly not regarded as an ideal solution, but a solution necessitated by the existing circumstances. The principal purpose of the treaties was not to rid the United States of naturalized citizens residing abroad. Their aim was to enable the United States to secure for naturalized citizens limited rights of protection while traveling in their country of origin rather than no protection at all. Furthermore, the Bancroft treaties did not automatically deprive citizens of their right to American citizenship upon residing for two years in the country of their origin, but only created a rebuttable presumption that a naturalized citizen who lived in his country of origin for that period intended to abandon his United States citizenship. 3 Moore's *International Law Digest* (1906), pp. 746-747, 748, 752.

c. *The 1907 Act*

In 1907 Congress, to implement the naturalization treaties and for considerations largely similar to those which led to the conclusion of the treaties, passed an Act setting a time limit on the period in which the United States would provide diplomatic protection to a naturalized citizen who resided abroad. 34 Stat. 1228 (See n. 9) The Act provided that if a naturalized citizen resided abroad for certain periods a presumption would arise that he had voluntarily abandoned his citizenship. The presumption could easily be rebutted by an expressed intent to remain a United States citizen. *United States* v. *Gay*, 264 U.S. 353.

See I(C)(1) above. This Act, also, did not deprive the person of citizenship as such, but only of the right to protection. It had no application to the citizen who returned to the United States no matter how long he had stayed abroad. 28 Op. Attny. Gen. 504 (1910).

In 1940 when Congress enacted the challenged provision, the historical problems of the 19th Century which made it necessary to limit the protection given to naturalized citizens residing abroad had been resolved. The legislative history does not indicate the existence of any such problems nor has the Government ever contended that the problems existed in 1940. Such problems were not even considered by Congress nor could they be in any way a basis for this legislation. Congress is required to deal with current problems and not to cope with problems of past generations which have been solved and are of no present concern. The problems of the middle of the nineteenth century, such as the impressment of American citizens into foreign armies, are completely irrelevant to the question whether the challenged statute was an appropriate means to deal with current problems.

d. *Isolated Cases of Refusal to Recognize Naturalization Could Not Justify Legislation*

The Government, in its earlier briefs, nonetheless has sought to justify the legislation to deal with the problem of the foreign country which refuses to recognize American naturalization.

In modern times, unlike the 19th Century, nearly all states recognize the holder of an American passport as an American citizen, and make no claim on his allegiance even though he be a former national of that

country. The Government does not contend otherwise. In this case, for example, appellant as long as she had an American passport was treated by Germany as an American, and Germany made no claim upon her.

However, even assuming that such a problem might exist with respect to a few countries, there is no indication why this now limited and unusual problem could not be resolved by legislation vastly narrower in scope than the broad restriction embodied in Section 352. For example, Congress could provide that naturalized citizens who travel to countries which do not recognize naturalization have no right to diplomatic protection. This would completely resolve any potential problem without affecting the right of naturalized citizens to reside in the overwhelming number of countries which recognize American naturalization. As shown under I(D)(2), Congress is required, especially where such vital rights as citizenship are at stake, to limit its measures to such as might be appropriate to deal with such special problems. *Perez* v. *Brownell, supra. Cf., Dean Milk Co.* v. *City of Madison,* 340 U.S. 349.

Moreover, it is not appropriate to consider the naturalization treaties and earlier legislation as a justification for the policy Congress has now adopted.

The treaties, as well as the 1907 Act, removed diplomatic protection from naturalized citizens who resided abroad for longer than certain periods of time in order to assure at least some recognition of American naturalization on the part of foreign countries.

The present act, however, does not have any purpose relating to the protection of naturalized citizens residing abroad. Indeed, as shown above, it has precisely a contrary purpose, that is, to strip the American

citizenship of naturalized citizens who reside abroad on the assumption that such citizens have for all intents and purposes abandoned the United States.

Of course, Congress may change its policy and adopt an opposite policy unless, as here claimed, the new policy is contrary to the Constitution. But the Government cannot rely on legislative history of a long-standing Government effort to assure protection to naturalized citizens residing abroad as a justification for a policy of denying protection and citizenship.

5. The Problem of Dual Nationality Can be No Basis for the Discrimination

The opinion of the District Court also notes that

> "... among the reasons Congress had for terminating the American nationality of naturalized citizens taking up residence abroad is that such termination will prevent them from transmitting American nationality to the foreign born children ...." (R. 52), 218 F. Supp. at 314

In the hearings leading to the enactment of this discriminatory provision embodied in Section 352 mention was made that this legislation was necessary so that naturalized citizens could not pass on American citizenship to their children who could remain American citizens without ever residing in the United States. As Mr. Flournoy, the Assistant Legal Advisor to the State Department, put it, Hearings Before the Committee on Immigration and Nationality, H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., p. 137 (1940):

> "And then I think another very important element of this thing is the children. It is utterly absurd that these Italians should live in Italy or

Hungarians who live in Hungary who are breeding citizens of the United States, who have a right, whenever they see fit, to come over to this country."

The problem of dual nationality in children raised abroad is plainly not limited to the children of naturalized citizens. If appellant had been born in the United States instead of naturalized, her children would also be dual nationals.

Moreover, this is a problem which can and has been dealt with by limited legislation dealing specifically with this particular problem.

As the District Court itself notes in its opinion (R. 35), 218 F. Supp. at 305, appellant's children in order to retain their American citizenship must come to the United States prior to the age of twenty-three and live here for at least five continuous years. Section 1401(a)(7). Furthermore, Section 350 of the 1952 Act, 8 U.S.C. § 1482, spells out when certain dual nationals lose their citizenship by residence in the foreign state of which they are nationals.

If any problems relating to dual nationals are not covered by these provisions, Congress could assuredly deal, and would therefore be required to deal (see (I)(D)(2) above), with this problem by less drastic means than depriving most naturalized citizens, who, like appellant, are not dual nationals, of their citizenship on the basis of residence abroad.

II. CONGRESS HAD NO POWER TO ENACT SECTION 352 EVEN WITHOUT ITS DISCRIMINATORY PROVISION

We have pointed out that the arbitrary discrimination against naturalized citizens in Section 352 is a violation of the Fifth Amendment's requirement of due process of law. But even if the Section applied to all citizens equally, we submit it would have been beyond the powers of Congress, to enact. Congress, under its foreign affairs power, does not have the authority to attach the withdrawal of citizenship to an act such as mere residence abroad which is completely consistent with allegiance to this country.

Congress has no general power to deprive any person of citizenship. "The power of naturalization, vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away . . . ." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703.

There is, of course, no question that citizenship may be voluntarily relinquished. The right of voluntary expatriation was recognized by Congress in 1868, Act of July 27, 1868, 15 Stat. 223.

It has also long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation, but that Congress may provide that certain actions, in derogation of undivided allegiance to the United States, constitute a voluntary abandonment of American citizenship. *Savorgnan* v. *United States*, 338 U.S. 491.

But, as shown below, the decisions of this Court, particularly *Perez* v. *Brownell*, 356 U.S. 44, clearly suggests that Congress in the exercise of its general powers may not attach expatriation to acts which, such as mere

residence abroad, are completely consistent with American citizenship.

There are only three cases in which this Court has sustained the withdrawal of citizenship under a statute. *Mackenzie* v. *Hare*, 239 U.S. 299, *Savorgnan* v. *United States*, 338 U.S. 491 and *Perez* v. *Brownell*, *supra*. In *Mackenzie* and *Savorgnan* the expatriating act was one through which the citizenship of a foreign country was acquired. In *Perez* this Court held that Congress, pursuant to its foreign affairs power, could take away the citizenship of a person who voluntarily voted in a foreign political election. The majority of the Court upheld the constitutionality of the statute because it felt that voting in a foreign political election could reasonably be held to connote both a lack of allegiance to the United States and allegiance to a foreign country. The minority dissented on the ground that voting in a foreign political election was not an act from which Congress could reasonably imply abandonment of American citizenship. There can, we submit, be no such difference of opinion with respect to the act of residing abroad. It is plainly consistent with continued allegiance to the United States.

Perez was the first case in which this Court has held that Congress may attach expatriation to an act which does not constitute an express renunciation of American citizenship by the acquisition of citizenship in a foreign country. In both *Mackenzie* and in *Savorgnan*, as we have seen, the citizen who was held to have expatriated himself had acquired a foreign nationality by the very act which was the basis of the expatriation.

This Court, however, has never held, in *Perez* or any other decision that Congress may attach expatriation

to an act which may not reasonably be deemed to be in derogation of undivided allegiance to this country. As Mr. Justice Stewart stated in his dissenting opinion in *Mendoza-Martinez,* 372 U.S. at 214:

> "This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country."

"And it cannot fairly be said that the present case is of that character." (Dissenting Opinion below of Judge Fahy, (R. 58, n.3); 218 F. Supp. at 317).

Mr. Justice Brennan in his concurring opinion in *Mendoza-Martinez* similarly stated, 372 U.S. at 187-188:

> ". . . the Court has never held that expatriation was to be found in Congress' arsenal of common sanction available for no higher purpose than to curb undesirable conduct . . . ."

On the contrary, as Mr. Justice Stewart noted in his dissenting opinion in *Mendoza-Martinez, Id.* at 241:

> "Previous decisions have suggested that Congressional exercise of the power to expatriate may be subject to a further constitutional restriction—a limitation upon the kind of activity which may be made the basis of denationalization."

Such a limitation on congressional power is clearly suggested in *Perez.*

This Court in *Perez* was careful to emphasize that the controlling elements in that decision were (1) the fact that voting in a foreign political election connoted a lack of allegiance to the United States and allegiance

to a foreign country, and (2) the fact that it involved the participation by a United States citizen in the political affairs of a foreign nation.

The *Perez* opinion states, 356 U.S. at 60-61,

> "... Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."

The Court, id. at 54 quotes from the report of the Cabinet Committee which recommended the legislation

> " 'Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.'

Id. at 57, this Court also stated:

> "The legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance."

The opinion emphasizes that Congress, under its foreign affairs power, may apply the sanction of with-

drawal of citizenship to deal with difficulties of an acute nature which may arise "when the citizen of one country chooses to participate in the political or governmental affairs of another country." 356 U.S. at 59.

Accordingly, we think that *Perez* clearly means that Congress has a power to attach expatriation only to acts which are inconsistent with allegiance and through their political nature connote allegiance to a foreign country.

Judge Fahy in his dissenting opinion below expressed a similar view of this Court holding in *Perez*:

> ". . . The premise stated by Mr. Justice Frankfurter in *Perez*, supra, to sustain the loss of citizenship where the individual had voted in a foreign election, should not be read as holding that such power sweeps all before it. Voting has been traditionally considered one way a person indicates his political allegiance. And our earliest statute on denationalization had to do primarily with codifying the ways in which it could be objectively determined that a citizen had exercised his right voluntarily to expatriate himself. It does not follow that any governmental action connected in some way with foreign relations can be judicially approved notwithstanding the Bill of Rights." (R. 60), 218 F. Supp. at 319

The reasons for the limitations on the power to expatriate which this Court has defined in *Perez* are, we think, obvious and compelling.

Citizenship is not a right which may be freely sacrificed to governmental expediency. Once a person becomes a citizen, be it by birth or naturalization, that person is made an integral part of the body politic. The Government is committed to that citizen even if his

citizenship should become a matter of embarrassment or difficulty. In return the citizen owes allegiance to his country and is obligated to perform whatever duties of citizenship may properly be imposed on him no matter how difficult or embarrassing it may be to him. As this Court stated in *Luria* v. *United States*, 231 U.S. 9, 22:

> "Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. . . ."

So long as the citizen maintains allegiance he is entitled to his citizenship and also in most cases to have his country protect him, even if this should be troublesome to its officials. Appellant's residence in Germany is of course in no respect embarrassing to this country.

The District Court, apparently recognizing these limitations on the power to expatriate in order to sustain the statute, concluded that appellant's foreign residence is not consistent with American citizenship. The Court stated that:

> ". . . settlement by a naturalized citizen in the foreign country of his nativity and the centering there of all his primary interest, as the plaintiff has done, is conduct traditionally regarded by this government as evidence tending to show an intentional surrender of American citizenship or as an importing form of transfer of allegiance to the foreign country." (R. 53), 218 F. Supp. at 314-315.

We submit, however, that mere foreign residence is clearly a neutral action neither connoting allegiance nor the lack of it. Residence abroad plainly cannot,

as the act involved in *Perez*, be reasonably regarded as inconsistent with allegiance to the United States or as a political activity which demonstrates an allegiance to a foreign government.

Hundreds of thousands of Americans now have their residences in other countries, some for business reasons, some for reasons of health, or for a great variety of other personal reasons. They include both naturalized and native-born citizens. These persons are in many cases engaging in the same kinds of activities which they might pursue in this country.[17]

It is impossible to see how residence abroad, taken alone, can demonstrate a want of allegiance to this nation, particularly in an era of vastly expanding foreign commerce, investment and travel. Congress itself has demonstrated that it does not regard mere residence as a sign of lack of allegiance, for it has not seen fit to expatriate native-born citizens even if they spend their entire lives in foreign countries.

The facts of this case demonstrate that appellant's residence abroad has no relation to her allegiance to the United States. The appellant's residence in Germany is solely the result of the fact that Germany is her husband's home and the place where he practices his profession. Plainly residence with her husband has no connotation of political allegiance to his country.

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[17] State Department figures show that there are at present some 699,000 Americans, excluding military personnel, who reside in foreign countries throughout much of the world. Although there are no statistics available as to how many of these are naturalized, it is to some extent indicative that of the some 918,000 United States passports issued during the year 1963, some 137,000 were issued to naturalized citizens.

Nor does mere residence abroad require political activity. Residence abroad does not involve participation in the political or governmental affairs of another country.

Mr. Justice Brennan in his concurring opinion in *Mendoza-Martinez* points out that flight from the country to escape the draft can be an equivocal action not inconsistent with allegiance to the United States, as it may be the result of "the unshakeable fear of physical stress or harm, the intellectual or moral aversion to combat, or mental aberration." (372 U.S. at 190)

A fortiori the residence abroad of appellant who lives in Germany to be with her husband, and the residence abroad of many citizens who live in foreign countries for personal, family or business reasons, is clearly consistent with allegiance to this country, and may not serve as a basis for expatriation.

The District Court, in its opinion, stated that there is nothing in the record which would indicate that appellant, since leaving this country, "has performed any of the duties of American citizenship or that she ever intends to resume them." (R. 53), 218 F. Supp. at 315. The court, however, does not point to any duty of citizenship which requires residence at home nor, of course, to any failure on the part of appellant to perform any specific duty while residing abroad.

III. SECTION 352 IMPOSES A PENALTY WITHOUT THE SAFEGUARDS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS.

This Court has held in *Trop* v. *Dulles*, 356 U.S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, that expatriation imposed under other provisions of the same Act constitutes a penalty.

In *Mendoza-Martinez*, this Court held the imposition of expatriation as a penalty *automatically* upon the performance of the proscribed conduct, is unconstitutional because of the lack of trial by jury and the other safeguards guaranteed by the Fifth and Sixth Amendments.

It is our position that Section 352 which automatically attaches loss of citizenship to residence abroad, also imposes this sanction as a penalty. As in *Mendoza-Martinez* none of the safeguards guaranteed by the Fifth and Sixth Amendments are provided.

Under Section 352 a naturalized citizen who resides abroad for the stated periods of time stands convicted of disloyalty to his adopted country, and is punished for this act by the forfeiture of his citizenship. Congress, as we have seen under I(D)(1), enacted this legislation on the assumption that naturalized citizens are citizens who have, for all intents and purposes, abandoned their allegiance to the United States. The statute, as shown in more detail below, creates a conclusive presumption that the naturalized citizen who resides abroad is disloyal to this country. Stated in a slightly different way, Congress considered it a disloyal act for a person to acquire citizenship by naturalization and then to take up residence in another country.

In *Mendoza-Martinez*, 372 U.S. at 168-169, this Court outlined the factors to be considered in determining whether a statute imposing a sanction is penal or regulatory. Under these standards we think it is clear that Section 352 imposes the sanction of expatriation as a penalty and is not, as the District Court held, a regulatory statute which Congress has passed under its foreign affairs power.

The sanction—loss of citizenship—clearly "involves an affirmative disability or restraint * * * which has been historically regarded as punishment." *Id.* at 168. As this Court pointed out in *Mendoza-Martinez*, 372 U.S. at 168, n. 23 "forfeiture of citizenship and the related devices of punishment and exile have throughout history been used as punishment."

The operation of Section 352 plainly "will promote the traditional aims of punishment—retribution and deterrence." *Id.* at 168. The manifest purpose and effect of Section 352 is to deter and prevent naturalized citizens from living abroad for longer than stated periods of time regardless of their allegiance to this country and regardless of whether the residence abroad may be embarrassing this country's foreign relations. Those naturalized citizens who do violate this obligation are punished by enforced forfeiture of their citizenship.

There is, as we have already seen, "no alternative purpose" which may rationally be assigned to this sanction and in any event "it appears excessive in relation to the alternative purpose assigned." *Id.* at 168-169. The alternative purpose which has been assigned to this statute is the regulation of foreign affairs. As we have shown under point I(D), this statute, which imposes this sanction only on naturalized citizens, is not rationally justified as a proper exercise of the foreign affairs power. Even if the residence abroad of naturalized citizens does cause some embarrassment to this country such embarrassment is, as Judge Fahy pointed out in his dissenting opinion not shown to be "certain or substantial" (R. 66), 218 F. Supp. at 322. Accordingly, the sanction imposed, loss of citizenship, which has been held by

this Court to be cruel and unusual punishment, *Trop* v. *Dulles, supra,* is clearly "excessive in relation to the alternative purpose assigned"—here, the avoidance of possible embarrassment in the conduct of foreign affairs.

In *Mendoza-Martinez* this Court also said that another factor to be considered in determining whether a statute was penal or regulatory, is whether "it comes into play only on a finding of scienter." *Id.* at 168. While Section 352 does not expressly require *scienter,* the reason that it does not is because Congress has already assumed *scienter* on the part of naturalized citizens who took up evidence outside the United States for stated periods of time.

Section 352 is premised upon a conclusive presumption that naturalized citizens who reside abroad have abandoned their allegiance to the United States. This is evident from the history of the Section. The Act of March 2, 1907, 34 Stat. 1238 (See note 9) created a presumption that a naturalized citizen who resided abroad for a stated period of time had abandoned citizenship. This presumption, however, could be "overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States . . ." The purpose and effect of Section 352 was to make this presumption conclusive. As the legislative history clearly shows, this presumption was made conclusive to avoid the administrative problems raised by the necessity of making a case-by-case determination under the earlier act. See I(D)(1) above. As Judge Fahy noted in his dissenting opinion, (R. 59 n. 4) 218 F. Supp. at 318, "what was sought to be avoided was the necessity to decide—either administratively or judicially—whether an individual had abandoned his

American citizenship by continued residence in the land of his birth or prior nationality." [18]

Accordingly, we submit under the standards set forth in *Mendoza-Martinez* the expatriation imposed by Section 352 is clearly penal in character.

We think that the penal nature of Section 352 is further highlighted by the exceptions to its operation in Sections 353 and 354. These Sections exempt from the penalties of Section 352 persons who have, for example, served in the Armed Forces in time of war, or incurred a disability in the service of the United States. These exceptions completely negate the assertion that Section 352 is a regulation of foreign affairs. For these exemptions are nothing more than a mitigation of punishment for certain kinds of good behaviour—behaviour totally unrelated to foreign affairs. In these exceptions Congress is rewarding naturalized citizens for certain services or actions with respect to this country. Rewards are the counterpart of punishment. They go together, and the system of rewards and punishment set up by Section 353 and 354 is unmistakably directed to individual conduct and not to the regulation of foreign affairs.

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[18] Another relevant factor mentioned by this Court in *Mendoza* is whether "the behaviour to which it applies is already a crime." *Id.* at 168. Residence abroad on the part of naturalized citizens has, of course, not been made a crime under any other statute, although of course, other acts of disloyalty have. In any event, this, however, is by no means a prerequisite for holding the provision to be penal. See, *Helwig* v. *U. S.*, 188 U.S. 605 and *United States* v. *Lovett*, 328 U.S. 303. As this court said, in *Mendoza-Martinez* the "criteria which must be considered in determining whether a statute is penal may often point in differing directions." 322 U.S. at 169. Here all but one of the relevant factors points strongly in one direction.

The conclusion that expatriation here is imposed as a penalty is in no way inconsistent with the decisions in which this Court has upheld expatriation as constitutional. *Mackenzie* v. *Hare, supra,* 239 U.S. 299; *Savorgnan* v. *U. S., supra,* 338 U.S. 491, and *Perez* v. *Brownell,* 356 U.S. 44.

As we have seen under III in these cases the Court upheld expatriation where Congress had made expatriation a consequence of conduct in derogation of undivided allegiance to the United States. In those cases the statute was held to be a reasonable exercise of Congress' foreign affairs powers because Congress, under its foreign affairs power may act with respect to the acquisition by an American citizen of foreign nationality, or the performance by him of political actions such as voting in foreign elections, which involve some degree of adherence to the Government of another country.

In those cases, therefore, there was an "alternative purpose" to which the withdrawal of citizenship could rationally be connected, *Mendoza-Martinez,* 372 U.S. 168-169. Such an "alternative purpose" sufficient to sustain this legislation as an exercise of the foreign affairs power is lacking here.

Accordingly, expatriation here is imposed as a penalty, and under *Mendoza* Section 352 is unconstitutional because the penalty is imposed automatically without the safeguards guaranteed by the Fifth and Sixth Amendments.

IV. SECTION 352 FAILS TO MEET THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT EVEN ASSUMING THAT IT IS NOT PENAL IN NATURE.

Even assuming *arguendo* that Section 352 is a regulatory rather than a penal statute, it violates the due process guaranteed by the Fifth Amendment.

Citizenship is, of course, a basic right which may not be denied without due process of law. In *Mendoza-Martinez,* this Court held that the imposition of expatriation as a penalty without the usual procedural safeguards guaranteed by the Fifth and Sixth Amendments violate the Constitution. The same harsh and drastic sanction of expatriation, even if not as a penalty, may not be imposed arbitrarily without the due process required by the Fifth Amendment. See *Perez* v. *Brownell,* 356 U.S. at 58 and *Nishikawa* v. *Dulles,* 386 U.S. 129. Lesser rights included in the right of citizenship such as the "right to travel" have also been held to be "a part of the 'liberty' " of which the citizen cannot be deprived without due process of law under the Fifth Amendment. *Kent* v. *Dulles,* 357 U.S. 116, 125.

Section 352 is, as we have seen under III above, based in its entirety on a conclusive presumption that naturalized citizens have abandoned their allegiance to the United States. This conclusive presumption was adopted as a matter of administrative convenience to avoid the necessity to determine allegiance of naturalized citizens residing abroad on an individual basis.

This conclusive presumption on which Section 352 is based is clearly arbitrary and does not meet the standards required by the Fifth Amendment.

In *Mendoza-Martinez,* Mr. Justice Stewart together with Justice White joined in the result reached by the

majority (with respect to *Cort*) precisely on the ground that the statute there involved a presumption violative of due process. The presumption involved there was that a person who leaves the United States and, after leaving, fails to comply with the draft laws, will be presumed to have departed "for the purpose of evading the draft." Mr. Justice Stewart, relying on *Tot* v. *United States,* 319 U.S. 463, 467, stated in his opinion that this statutory presumption was "constitutionally invalid because there is insufficient 'rational connection between the fact proved and the ultimate fact presumed.'" 372 U.S. at 217. Mr. Justice Stewart went on to say:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Manley* v. *Georgia,* 279 U.S. 1, 6. A federal statute which creates such a presumption is no less violative of Fifth Amendment due process. 'Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.'" *Ibid.*

See also *Bailey* v. *Alabama,* 219 U.S. 219.

It is clear that the presumption on which this entire statute is based must fail for the same reasons. The presumption that a naturalized citizen who resides abroad has abandoned his allegiance to the United States is clearly arbitrary as there is no necessary connection between residence and allegiance and the naturalized citizen is denied any opportunity to rebut this presumption.

The extent to which this presumption deprives the naturalized citizen of his rights of due process are indicated by the fact that if Congress had made the

fact presumed—the abandonment of allegiance—the expatriating act the burden would have been on the Government to prove that act "by clear, convincing and unequivocal evidence." *Nishikawa* v. *Dulles*, 356 U.S. 129, 133.

The effect of the statute in denying procedural due process is emphasized by the language of the District Court opinion. From that opinion, it is clear that the majority District Judges, as well as the Congress, have convicted appellant of disloyalty and of the dereliction of her duties as a citizen without a trial. They have disregarded the fact that, under the statute, appellant was neither given specific charges of disloyalty nor was she given an opportunity to meet such charges. Thus, the court below stated as follows (R. 53), 218 F. Supp. at 315:

> "Finally, the plaintiff insists that she is an American by training, in thought and in feeling, and that she values highly her American citizenship. But these sentiments, however, sincere, were not conducive to her retention of residence in the United States. *Nor is there anything in the record to show that since leaving this country she has performed any of the duties of American citizenship or that she ever intends to return to assume them.* By voluntarily going to the foreign country of her birth and there continuously residing for three years, she has brought on her expatriation." (Emphasis supplied)

Of course, there is nothing in the record which shows in the slightest that appellant has failed to perform any duty imposed upon her as a citizen. The court does not specify what duties of American citizenship it assumes appellant has neglected to perform or why she must "return" to "assume" them.

We assert that contrary to the allegations of the court below, Mrs. Schneider has and will continue to perform *all* of her responsibilities as an American citizen and that this is the meaning of her declarations of loyalty in the record (R. 7, 9). But if the Government intends to assert that this is not the case, and to charge Mrs. Schneider with derelictions in her responsibilities as a citizen, it would of course be the obligation of the Congress to lay down standards of dereliction of duty, to require specific charges to be made, and to give appellant an opportunity to defend herself against the charges.

For, leaving aside the fact that certain derelictions in duties as a citizen are not grounds for denationalization (see *Trop* v. *Dulles*, 356 U.S. 86), and assuming that the supposed derelictions in her duties would be a ground for denationalization, she should at least be adivsed of what those supposed derelictions are and provided a forum for defending herself against the allegations of such dereliction.

But the statute lays down no standards and gives no opportunity for defense. Instead, it creates a conclusive presumption of disloyalty and gives no opportunity for a due process procedure for determining the question.

It accordingly is plain violation of the procedural due process requirements of the Fifth Amendment.

V. SECTION 352 IS REPUGNANT TO THE EIGHTH AMENDMENT.

As we have seen under III above, section 352 is clearly penal in nature. In *Trop* v. *Dulles*, 356 U.S. 86 this Court held that expatriation imposed as a penalty for desertion in time of war constitutes a cruel and unusual punishment in violation of the Eighth Amend-

ment. We submit that *a fortiori* expatriation imposed as a penalty for residence abroad also represents a cruel and unusual punishment.

Mr. Chief Justice Warren in his opinion in *Trop* stated in strong language that expatriation as a punishment is barred by the Eighth Amendment.

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.
>
> "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. * * * It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." 356 at 101-102.

The expatriation as applied to a naturalized citizen under Section 352 has the same harsh consequences. Appellant, for example, by the deprivation of her American nationality has been left a stateless person

and lives in Germany at the mere sufferance of that country. Even though Germany has been generous in permitting her to remain there, she is subject to the threat that this may not always be the case.

The District Court in its opinion has pointed out that appellant at the present time could acquire German nationality. This is no answer to the cruel and unusual nature of the punishment imposed. (R. 35), 218 F. Supp. at 304. Mrs. Schneider does not want to acquire German nationality as she has no allegiance to Germany. German citizenship could in no event be a substitute for her rights of American citizenship.

CONCLUSION

Appellant is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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APPENDIX

Additional Relevant Statutes

The following is the text of Sections 353, 354, 356 and 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1101:

SECTION 352 NOT EFFECTIVE AS TO CERTAIN PERSONS

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

"(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) . . . has gone or goes abroad, and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States exclusively

(a) by his own ill health; or (b) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance . . . ."

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is a spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1)—(5) or (6) of this section, or paragraph (2) of section 354 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period or periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States: *Pro-*

vided, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804(b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

SECTION 352 (A) (2) NOT APPLICABLE AS TO CERTAIN PERSONS

SEC. 354. Section 352(a)(2) of this title shall have no application to a national—

(1) who is a veteran of the Spanish-American War, World War I, or World War II, or of the Korean hostilities (having served honorably in an active-duty status in the military, air, or naval forces of the United States during a period beginning June 25, 1950, and ending July 1, 1955), and the spouse, children, and dependent parents of such veteran whether such residence in the territory of a foreign state or states commenced before or after the effective date of this chapter: *Provided,* That any such veteran who upon June 27, 1952, has had his residence continuously in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated for three years or more, and who has retained his United States nationality solely by reason of the provsions of section 406(h) of the Nationality Act of 1940, shall not be subject to the provisions or requirements of section 352(a)(1) of this title: *Provided further,* That the provisions of section 404(c) of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to veterans of World War II;

(2) who has established to the satisfaction of the Secretary of State, as evidenced by possession of a valid unexpired United States passport or other valid document issued by the Secretary of State, that his residence is temporarily outside of the United States for the purpose of (A) carrying on a commercial enterprise which in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce; or (B) carrying on scientific research on behalf of an institution accredited by the Secretary of State and engaged in research which in the opinion of the Secretary of State is directly and substantially beneficial to the interests of the United States; or (C) engaging in such work or activities, under such unique or unusual circumstances, as may be determined by the Secretary of State to be directly and substantially beneficial to the interests of the United States;

(3) who is the widow or widower of a citizen of the United States and who has attained the age of sixty years, and who has had a residence outside of the United States and its outlying possession for a period of not less than ten years during all of which period a marriage relationship has existed with a spouse who has had a residence outside of the United States and its outlying possessions in an occupation or capacity of the type designated in paragraphs (1), (2), (3), (4), or (5) (A) of section 353, or paragraphs (1), (2), or (4) of this section;

(4) who has attained the age of sixty years, and has had a residence outside of the United States and its outlying possessions for not less than ten

years, during all of which period he has been engaged in an occupation of the type designated in paragraphs (1), (2), or (4) of section 353, or paragraph (2) of this section, and who is in bona fide retirement from such occupation; or

(5) who shall have had his residence in the United States for not less than fifteen years subsequent to his naturalization and prior to the establishment of his foreign residence; or who prior to attaining the age of twenty-one years, shall have had his residence in the United States for not less than fifteen years subsequent to his lawful admission for permanent residence.

NATIONALITY LOST SOLELY FROM PERFORMANCE OF ACTS OR FULFILLMENT OF CONDITIONS

SEC. 356. The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 368

ANGELIKA L. SCHNEIDER,
Appellant,

v.

DEAN RUSK, Individually and as Secretary of State,
Appellee.

On Appeal From the United States District Court for the District of Columbia

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1963

No. 368

ANGELIKA L. SCHNEIDER,

ellant,

v.

DEAN RUSK, Individually and as Secretary of State,

Appellee.

On Appeal From the United States District Court for the District of Columbia

---

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of this Court.

The American Civil Liberties Union, a national non-profit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship and the privileges of freedom which it brings, we seek to guard against the arbitrary deprivation of our birthrights. In the last ten years 15,709 naturalized Americans were

deprived of their citizenship by reason of residence abroad. During this period this ground of expatriation exceeded all others. (1961 Annual Report of the Immigration and Naturalization Service, p. 96.) Most countries of the world do not deem it advisable to predicate loss of citizenship upon this basis.

We believe that the expatriation of naturalized citizens by reason of foreign residence constitutes an encroachment upon the rights of American citizenship given to individuals under the Fourteenth Amendment and that it establishes an unconstitutional discrimination which was neither contemplated nor favored by the draftsmen of our Constitution. This brief is submitted in an effort to assist the Court in its analysis of this encroachment and this discrimination, as well as the constitutional problems thereby raised.

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 4

The Congress shall have power * * * to establish a uniform rule of naturalization.

Article II, Section 1, Clause 5

No person except a natural born citizen * * * shall be eligible to the office of President.

Fifth Amendment

No person shall * * * be deprived of life, liberty, or property without due process of law * * *.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

IMMIGRATION AND NATIONALITY ACT OF 1952

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U. S. C. § 1484, reads as follows:

"Loss of nationality by naturalized national

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act."

Question Presented

Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U. S. C. 1484) providing for the loss of American citizenship by a naturalized citizen who resides continuously in the foreign state of which he was formerly a national, is constitutional.

Statement*

Petitioner, Angelika Schneider, born in Germany in 1934, came to the United States at the age of five, became an American citizen through derivative naturalization in 1950, and remained here continuously from 1939 until 1954. In 1956 she left the United States to marry a German lawyer with whom she has resided ever since with the exception of

* Adapted from the opinion of the court below, 218 F. Supp. 302, 304-305.

a six week visit to the United States in 1957. Petitioner's two sons, born in Germany in 1957 and 1958 have been registered as Americans under 8 U.S.C. 1401(a)(7). However, in 1959 the State Department ruled that petitioner's citizenship was forfeited by three years' continuous residence in Germany. Her six week visit to the United States in 1957 was not considered of sufficient duration to break the continuity of her foreign residence.

Summary of Argument

Article II, Section 1, Clause 5 of the Constitution creates a single, narrowly defined limitation upon the rights of naturalized citizens. They are denied eligibility for the office of the President. No other distinctions between native and naturalized Americans are constitutionally proper. *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824); *Luria* v. *United States*, 231 U. S. 9, 22, 24 (1913).

Sources and guides customarily utilized by the courts in ascertaining the meaning of the Constitution all reinforce the view that no other distinction was contemplated. Early English law granted the naturalized citizen equality with the native born. *Coke on Littleton*, fol. 129 a (1628); *Blackstone's Commentaries*, Book I, Chap. 10; *Collingwood and Pace*, 1 Vent., 413, 420, 429; 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664); *Regina* v. *Manning*, 2 Car and. K 891, 900, 175 Eng. Rep. 374, 378 (Ex. Ch. 1849).

Colonial laws of Virginia, Maryland, Pennsylvania, Massachusetts and Delaware granted the naturalized citizen all the privileges of natural born subjects. "The effect of naturalization in the several States before the Constitution was adopted was, therefore, to remove alienage, the person naturalized standing in all respects upon the same plane with the natural born citizen, except that he was under certain removable political disabilities", *House Document 326*, 59th Cong. 2d Sess., (1906) p. 9.

During the constitutional debates it was suggested that eligibility for Congressional office be confined to natives. IV *Writings of James Madison* (Putnam's Sons, 1906), p. 172; 2 *Farrand, Records of the Federal Convention* 238. The desire to encourage the immigration of worthy foreigners and the dilemma which such a proposal would cause the colonies whose laws had pledged equality between native and naturalized citizens was successfully urged to defeat this proposal. 2 *Farrand, supra,* 270-272; IV *Writings of James Madison, supra,* 173-176.

When the question of the impressment of American seamen arose, Secretary of State James Monroe advised the British Minister that the United States could not discriminate between the native and naturalized citizen, nor ought the British Government "expect it as it makes no such distinction itself". *American State Papers, Foreign Relations,* III, 1787-1828, pp. 454, 464. President Madison, the chief draftsman of the Constitution, likewise asserted "By our law, all the rights of natives are given to naturalized citizens". *Ibid.* at 696.

In 1859 Attorney General Black advised President Buchanan that "a native and naturalized American may • • • go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born". 9 *Op. Atty. Gen.* 360 (1858-59). Attorney General Williams similarly advised President Grant in 1873 that he knew of no principle upon which the rights of native and naturalized citizens residing abroad could be distinguished. *Foreign Relations of the United States,* 1873, Vol. II, pp. 1216, 1218. The Expatriation Act of 1868 (15 Stat. 223, Revised Statutes, Sec. 2000) not only declared that "the right of expatriation is a natural and inherent right of all people", but also asserted that "All naturalized citizens of the United States while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens". In the debates which

led to this enactment, it was frequently acknowledged that naturalized and native-born citizens were identical before the law of this country. *Congressional Globe*, 40th Cong. 2d Sess. (1868), pp. 832, 1013, 1015, 1018. In 1868 the Fourteenth Amendment reasserted, without differentiation, that all persons born or naturalized in the United States are citizens.

It is in the light of this background that the legislative distinctions between native and naturalized Americans must be judged. The 1907 Expatriation Act has been construed to deny diplomatic protection to a naturalized citizen residing abroad for more than two years in his native state or five years in any other foreign state (34 Stat. 1228). However, the Nationality Act of 1940 (54 Stat. 1170, 8 U. S. C. 804) decreed automatic expatriation for naturalized citizens who reside abroad for prescribed periods. These provisions were reenacted in the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U. S. C. 1484).

The justification for the present discrimination against naturalized citizens is said to be founded in the international policy of our government to lessen friction with foreign governments. *Lapides* v. *Clark*, 176 F. 2d 619 (C. A. D. C., 1949). Testing this discrimination by the standard of *Perez* v. *Brownell*, 356 U. S. 44, 60 (1957), we believe that the means adopted, the withdrawal of citizenship from a selected category of citizens, is not reasonably calculated to effect the end that is within the power of Congress to achieve, and that its differentiation between native born and certain naturalized citizens is so arbitrary as to be a deprivation of due process. The discrimination is based solely upon place of birth. Distinctions "between citizens solely because of their ancestry", this Court has said, "are by their very nature odious to a free people". *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Distinctions based upon place of birth are no different. Judge Edgerton, dissenting, *Lapides* v. *Clark*, *supra*.

ARGUMENT

I

Historical background and purpose in provisions for expatriation by reason of foreign residence.

The English doctrine of perpetual allegiance naturally precluded expatriation by foreign residence. Under this doctrine citizens might remain abroad indefinitely. *Tsiang, The Question of Expatriation in America Prior to 1907* (1942), Chapt. 1.

In the United States prior to the Act of 1907 there is record twice of Congressional objections against permitting American citizens, native and naturalized, to live abroad. A bill introduced in the House of Representatives in 1808 would have confined citizenship to persons only "while they actually reside in the United States" and would have forever barred from reacquiring citizenship any person expatriated for foreign residence. 18 Cong. Annals 1871, 10th Cong., 1st Sess. The Bill died in committee. *Ibid.*

Loss of protection for those who resided permanently abroad was suggested also in the bill from which the Expatriation Act of 1868 evolved. *House Document 326*, 59th Cong., 2nd Sess., pp. 23, 24. However, this proposal was abandoned in the ultimate legislation and Congress expressly affirmed the right of naturalized citizens to receive the same protection, while in foreign countries, which is accorded to native born citizens. 15 Stat. 223, Revised Statutes, Sec. 2000.

In 1906 a three member citizenship board appointed by Elihu Root recommended that expatriation might be assumed when an American—either native born or naturalized—becomes domiciled in a foreign state. This was

suggested as a rebuttal presumption. In support of this proposal it was said:

> "* * * the class of Americans who separate themselves from the United States and live within the jurisdiction of foreign countries is becoming larger every year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers.
>
> "* * * Naturalized citizens are more apt to go abroad than native citizens. Having already changed their domicile, they are more apt to change it again. * * * It is the duty of the Executive to protect every American from unlawful molestation, but it is not his duty to protect an American from just punishment for violating any law of a foreign country, and the refusal of protection is not necessarily a denial of American citizenship." *House Document 326, supra,* pp. 23, 25, 26.

The embarrassment in question related primarily to the impressment of male citizens into the armed forces of European countries. Great Britain had impressed native born and naturalized Americans in 1812. Later we experienced difficulties with Prussia and other countries as a result of the enforcement of their conscription laws. *House Document 326, supra,* pp. 9-10; *Tsiang, supra,* pp. 75, 99. These problems, however, have been resolved or mitigated by the conclusion of naturalization or military treaties. III *Hackworth, Digest of International Law (1942),* p. 166.[1]

[1] Treaties were concluded with various countries beginning in 1868 when one was concluded with the North German Confederation. 15 Stat. 615. These treaties acknowledged the right of expatriation and permitted punishment for offenses committed prior to emigration. Some required five years residence in the adopted country before expatriation would be recognized. Some like the convention adopted by the Third International Conference of American States held at Rio de Janeiro in 1906, provide for a presumption of expatriation

[Continued on page 9]

Contrary to the recommendations of the 1906 Citizenship Board, Congress in 1907 provided for presumptive loss of citizenship solely for naturalized citizens residing abroad in a country from which they came for two years or in any other foreign country for five years. 34 Stat. 1228. This was interpreted to provide merely for loss of diplomatic protection rather than for loss of citizenship itself. *Camardo* v. *Tillinghast*, 29 F. 2d 527, 530 (C. A. 1, 1928). Under the rules of the State Department, moreover, the presumption of loss of protection might be overcome by the making of "definite arrangements to return immediately to the United States permanently to reside". III *Hackworth*, *supra*, p. 296.

The Nationality Act of 1940 for the first time provided for the loss of citizenship for naturalized citizens residing abroad for three years in countries of their nativity or former nationality or in any other foreign state for five years. 8 U. S. C. 804(b) and (c); 54 Stat. 1170. In suggesting the change from loss of protection to loss of citizenship, the State Department's Passport Office through Mr. Flournoy testified:

> "This, Mr. Chairman, I should say is the most important proposed change in the whole code, and may be the subject of some controversy. We in the State Department, and so far as I know those in the other Departments, think it is a reasonable and most desirable provision. We have every day in the State

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[Continued from page 8]

and reacquisition of native born citizenship when a naturalized citizen resumes residence for two years in the country of his birth. *Tsiang*, *op. cit.*, pp. 88, 90; III *Moore*, *International Law Digest* (1906), pp. 358, *et seq.*; III *Hackworth*, *supra*, p. 377.

For the full text of some of these treaties see *Hearings on H. R. 6127*, *superseded by H. R. 9980*, 76th Cong., 1st Sess., pp. 626, *et seq.* Both the Nationality Act of 1940 and the Immigration and Nationality Act of 1952 (with limited exceptions) provided that its provisions should not be applied in contravention of existing treaties. 8 U. S. C. 810, 1489.

Department cases of persons applying to us for passports or protection, or asking us to support claims, who have been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years. We think there should be some point at which such persons should lose not only his right to protection but his citizenship itself. We consider it very undesirable that we should have persons who are not entitled to the protection of our Government and yet remain as citizens of the United States. It makes it difficult for us to extend the effect of protection to those who are really citizens and have maintained connections with the United States, to have these people retaining their citizenship." *Hearings on H. R. 6127, superseded by H. R. 9980,* 76th Cong., 1st Sess., pp. 134-5.

In the message transmitting the draft of the 1940 Act to the President by the Secretaries of State and Labor and the Attorney General, it was said that:

"In general the right to protection should be co-existent with citizenship, and a law under which persons residing abroad are denied the protection of the Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable. The admission of an alien to the privilege of American citizenship is subject to the condition that he intends to reside permanently in the United States and perform the duties of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow." *Hearings on H. R. 6127, superseded by H. R. 9980,* supra, p. 409.

The explanatory comments of the draft code of the Nationality Act of 1940 set forth this basis for the expatriation provisions:

"While the provision of subsection (b) for loss of nationality in cases of naturalized citizens who

reside for three years in their countries of origin may appear somewhat drastic, it is believed to be fully warranted, by the numerous cases which have been brought to the Department's attention in past years, especially in connection with applications for passports or consular registration, for diplomatic protection, or for the support of claims against the governments of such countries. This provision is not in conflict with the position taken by the Government of the United States in past years with regard to protection of naturalized citizens or with treaties on that subject * * *. * * * It is not to the advantage of the United States to attempt to extend diplomatic protection to such persons who are a distinct liability, rather than an asset, to this country. Moreover (what is quite important), it is believed that a definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalization to conclude such treaties and to recognize the American nationality of the persons concerned when they return to their countries of origin for legitimate objects and for residence of a temporary character. * * * Needless to say, naturalized citizens who resume residence in foreign lands from which they came are apt to renew old associations and ways of living and thinking and thus become merged in the native population, losing to a degree, if not completely, their American character and feeling. *Hearings on H. R. 6127, superseded by H. R. 9980, supra,* pp. 495, 496.

Thus, it appears from the foregoing and the thirteen illustrative cases set forth in the hearings at pp. 497-501, that the Department of State was concerned with: (1) Making protection coextensive with citizenship. This could be accomplished by retaining both or terminating the citizenship of those residing abroad. Congress chose to terminate. (2) Preventing the transmission of citizenship to children born to naturalized citizens residing abroad.

This was accomplished by requiring an American citizen married to an alien to reside in the United States for ten years prior to the birth of the child. 8 U. S. C. 1401(a)(7). (3) Encouraging naturalization treaties. Generally, naturalization treaties contained their own provisions for loss of citizenship or protection. Most of them—as in the case of those with various South and Central American states—provide for presumptive loss of citizenship where there is two years residence in one's native country. The 1940 statute was, therefore, inconsistent. In fact, there is no evidence that it has encouraged the conclusion of any treaty whatsoever. (4) Preventing the exercise of citizenship rights by persons who did not intend to reside here permanently at the time of naturalization. This situation can be and is handled by strict enforcement of our naturalization requirements and denaturalization proceedings. 8 U. S. C. 1451(d). (5) Preventing naturalized Americans from renewing "old associations and ways of living and thinking". If such conduct cannot be regulated while the naturalized American is in the United States, can it be regulated during his residence abroad?

Under the 1940 Act naturalized citizens were exempted from the ban on three and five year residences abroad if they were in the employ of the Government, compensated by the Government and residing abroad on account of disability incurred in its service, over sixty-five with a twenty-five year residence in the United States after naturalization, residing abroad to represent a bona fide American organization and receiving substantial compensation therefor, residing abroad on account of ill health, residing abroad to study for not more than five years, residing abroad to be with a naturalized American husband, wife, or parent who is exempt, and if they were native American women who lost citizenship through marriage and reacquired it through naturalization. 8 U. S. C. 805, 806; 54 Stat. 1170. In 1942 exemptions were extended to those residing abroad to be with a spouse or parent who had been in the United States

for ten years during minority, and to veterans of the Spanish American War and the World War and their families. 88 U. S. C. 806(g) and (h), 56 Stat. 1086.

By reason of World War II, the effective date of the expatriation provisions in question was postponed on several occasions. It did not become effective until October 14, 1946. 8 U. S. C. 809, as amended by 59 Stat. 544. These postponements, however, were not sufficient.

In March of 1947 a Special Committee of the National Council on Naturalization and Citizenship published a report on the "Involuntary Loss of American Citizenship." This report was prepared in collaboration with the Department of State and "the sources from which information was obtained were, primarily, American consuls in foreign countries, American social agencies * * * American business organizations having branches or affiliates in foreign countries and interested individuals." In part, this report states:

> "Difficulty in obtaining transportation because of lack of space on passenger boats was reported as the factor known to have caused loss of citizenship by consuls in South Africa, Argentina, Portugal, Sweden, Spain and Italy. A related factor was the high cost of passage from distant points and the inability of some persons to raise the necessary funds within the two months period before the deadline." * * * (pp. 11-12).
>
> "Delays in dealing with requests for passports and other papers by staffs of Government departments in the United States were alleged to have been responsible for the loss of citizenship in several cases." * * * (p. 14)
>
> "The agencies who reported to your Committee give vivid illustrations of further causes. Some persons did not return on time because of the seaman's strike; some could not return because in countries such as Yugoslavia, Roumania and Russia they were unable to obtain exit permits. The war brought finan-

> cial stringency to others making it impossible for them to pay their own passage home or to bring their families with them. Others could not return because they could not obtain exit permits or transportation or necesary travel documents. The search for proof of naturalization took time and the preparation of necessary documents was often delayed by congestion in the offices of American government agencies.
>
> "It is clear that through the enactment of our expatriation laws a considerable number of American citizens were unduly deprived of their citizenship, contrary to their own volition, by factors beyond their own control." (p. 16)

Our State Department has been less than happy with the provisions of law which expatriate naturalized citizens residing abroad. On May 20, 1950[2] Ruth B. Shipley, then Chief of the Passport Division, said:

> "The problem is how to remedy the unexpected cruelty and injustice of those sections of the Code relating to the involuntary loss of nationality—by that I mean loss by:
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> • • •
>
> "Living two or three years in one's native land or five years in a third country.
>
> • • •
>
> "Residence in one's native land to nurse a sick and elderly parent or a near relative who is helpless

[2] See New York Times of May 21, 1950. Compare the views of Mrs. Shipley in the *Joint Hearings on S. 716*, 82nd Cong., 1st Sess., p. 247, where she confined her views to the removal of expatriation for those residing in third countries. In her testimony she observed: "* * * there are a large number of American women married to foreigners, to men of real distinction and ability and importance in their own country. Well, of course, they are in those countries to live with their husbands, but their being Americans, and presenting in the foreign country the American way of life, friendliness, and good will, I think is a distinct asset for our country, and one particularly at this time."

and alone and perhaps a war casualty has caused many of our citizens to lose citizenship. Do you feel that such unselfish service justifies the loss of citizenship by a naturalized American citizen? The penalties of homesickness and longing to be reunited with family and home in America seem of themselves a heavy price to pay for the normal filial devotion native in our people.

"It is the duty of the Government to protect its citizens. Why, then, should we make stateless persons of those naturalized citizens—doctors, dentists, lawyers, clergymen, engineers, financiers, who work in third countries under the proud titles of American doctor, dentist, etc., just because the calendar rolls up five years residence abroad. Are they not really good neighbors promoting one of our great principles and raising the standards of life through their fine professional training in American institutions—and yet—they are made stateless.

"There is no great change in world affairs that makes it wise or necessary or even desirable to cast away so lightly our citizens who have chosen this country above all others and inflict on them one of the gravest tragedies of all times—statelessness. There are many other instances with which you are familiar which seem to indicate beyond any question that the present law works hardship never dreamed of by those enacting it. We might take a lesson from the British in this. They have always had world-wide interests and realize the importance of keeping loyal British subjects.

"Inasmuch as there has been introduced into the Senate a new version of the Nationality Code, we will be invited to express our recommendations to the Congress and it seems to me the clear duty of those of us who understand the injustice and the un-American character of the penalties inflicted at present on some of our citizens to work earnestly to change the law by presenting the clear picture to our Congress, remembering that the Secretary of State has always the power inherent in his position to withdraw the protection of this Government from

any citizen, native or naturalized, whose actions abroad are inimical to the best interests of the United States. No cancellation of citizenship is necessary. It seems to me the traditional position of this Government that the loss of citizenship should result from a direct act of the citizen which is generally regarded as inconsistent with allegiance to the United States and as expatriation, such as voluntary naturalization in a foreign country, taking an oath of allegiance to a foreign sovereign, taking the oath of renunciation of American citizenship, committing treason or deserting the armed forces in time of war. These represent a group of disloyal acts for which cancellation of citizenship is a normal penalty.

"Reviewing the position of our country today as we endeavor to bind up the wounds of the war and to aid in economic recovery many of the nations and also to better the conditions of the backward countries, we must seriously consider the spiritual and moral devastation wrought unintentionally by acts of our own law. It is our impelling duty to bring the nationality law into harmony with the declaration of human rights and the moral code of brother toward brother."

The bar against foreign residence for three and five years was continued by the Immigration and Nationality Act of 1952: 8 U. S. C. 1484, 66 Stat. 269. The exempt class was expanded to permit residence abroad by reason of the ill health of parent, spouse or child. Inhabitants of American possessions acquiring naturalization by Act of Congress or treaty are placed "on a par with native born citizens with respect to freedom to live abroad indefinitely without losing United States nationality". 8 U. S. C. 1485(10). Veterans of World War I residing in their native lands on the effective date of the Act are permitted to continue their foreign residence. Otherwise, all veterans are exempt solely from the five year residence ban. They are denied residence of more than three years in the country

of their former nationalities. 8 U. S. C. 1486, 66 Stat. 271; *House Report 1365*, 82nd Cong., 2d Sess., p. 85.

These discriminatory provisions have evoked widespread criticism.[3] Typical is the statement of former President Eisenhower on October 21, 1952:

> "Only second-class Americanism tolerates second-class citizenship. It's time to get rid of what remains of both, and that includes rewriting the unfair provisions of the McCarran Immigration Act." *New York Times*, October 22, 1952.[4]

In the same vein, Adlai E. Stevenson wrote on December 28, 1955 (102 Cong. Rec. 83, 84, January 5, 1956):

> "The McCarran-Walter Act of 1952 subjects naturalized citizens to restrictions which do not apply to native-born citizens, for instance, in the matter of the permissible length of residence abroad. The claim that there is no satisfactory basis for such distinctions seems sound * * *."

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[3] Many witnesses appearing before the President's Commission on Immigration and Naturalization in 1952 were critical of what they called the "second-class" citizenship provisions of our nationality laws. *Whom We Shall Welcome, Report of the President's Commission on Immigration and Naturalization* (1953), p. 236.

[4] In a letter dated April 22, 1953, addressed to Senator Watkins, former President Eisenhower said:

> "In the State of the Union Message I pointed out that 'existing legislation contains injustices'. Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following:
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> * * *
>
> "4. The provisions under which it is asserted, naturalized citizens have only 'second-class' citizenship because they, as distinguished from native-born citizens, can be expatriated because of residence abroad for certain periods of time, without reference to any other conduct on their part." *Konvitz, Civil Rights in Immigration* (1953), pp. 190, 191.

Thomas K. Finletter observed in a speech on June 12, 1956 (*American Immigration Policy, Selected Statements,* American Immigration Conference, 1957, p. 9):

> "Then too, and deserving of a special category, is the shameful idea of a caste system which we have introduced in this country. We have two kinds of American citizens. We have American-born citizens and American-naturalized citizens. The rights of the two are very different. Just how far this country of ours can go in for this peculiar and un-American idea of caste is beyond me."

II

Congress has no power to discriminate against naturalized citizens by depriving them of their citizenship under circumstances which would not result in such loss by native born citizens.

The Government of the United States is one of delegated and limited powers; it derives its existence from the Constitution and can claim no powers except those granted expressly or by implication in that document. Amendment X; *Marbury* v. *Madison,* 5 U. S. 137 (1803); *Martin* v. *Hunter's Lessee,* 14 U. S. 304 (1816).

The sole power granted Congress with respect to naturalized citizens is found in Article I, Section 8, Clause 4 of the Constitution which grants Congress the right to establish "an uniform Rule of Naturalization." Reading this section against the background of the legal principles prevailing at the time of the framing of the Constitution, the historical circumstances surrounding its incorporation into our supreme law, and the social need it was framed to meet, the conclusion is inevitable that the naturalization contemplated by the Constitution was a naturalization which when validly achieved would place the naturalized citizen on an equal footing with the native born. Thus, under the doc-

trine of limited powers, the sole power granted the Congress is to provide a procedure whereby aliens may attain this parity with native born citizens. Any attempt by Congress to destroy or derogate from the rights and privileges of naturalized citizens and to impose on them liabilities, obligations and burdens not imposed on the native born is beyond its constitutional authority.

This clearly conceived constitutional limitation on Congressional power is indicated not only by the naturalization clause itself, but by Article II, Section 1, Clause 5 of the Constitution which states that "No person except a natural born citizen * * * shall be eligible to the Office of President". Under a well established rule of construction, this specific provision for a single, narrowly defined restriction on naturalized citizens implies the denial of the general power to treat such citizens differently from those born in the United States.[5]

By expressly providing for one distinction between naturalized and native born citizens, that is, eligibility to the Presidency, the Constitution itself has prescribed the only permissible distinction between these citizens. Congress may make no other.

(A) Judicial Expressions

The courts have consistently recognized this want of power in Congress to derogate from the rights of naturalized citizens and have been vigilant in upholding the doctrine of the equality before the law of all citizens, irrespective of national origin. In *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824), Chief Justice Marshall held that:

> "A naturalized citizen * * * becomes a member of the society, possessing all the rights of a native

[5] For the use of this rule in interpreting the Constitution, see *Brown* v. *Maryland*, 25 U. S. 419, 438 (1827) (opinion by Chief Justice Marshall); and *Rhode Island* v. *Massachusetts*, 37 U. S. 657, 722 (1838).

> citizen, and standing in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."

In 1913, faced with the claim that a statute providing for the cancellation of a fraudulent certificate of naturalization unlawfully discriminated between naturalized and native born citizens, the Supreme Court was careful to point out that the section in question "makes no discrimination between the rights of naturalized and native born citizens and does not in anywise affect or disturb rights acquired through lawful naturalization." In the course of the opinion, the Court reaffirmed the Constitutional doctrine by that time deeply imbedded in our law that "Under our Constitution a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility for the Presidency." *Luria* v. *United States*, 231 U. S. 9, 22, 24 (1913). See also *Knauer* v. *United States*, 328 U. S. 654, 658 (1945); *Baumgartner* v. *United States*, 322 U. S. 665, 673 (1944); *United States* v. *Macintosh*, 283 U. S. 605, 623-4 (1931); overruled on other grounds, *Girouard* v. *United States*, 328 U. S. 61, 69 (1946); *Boyd* v. *Nebraska ex rel. Thayer*, 143 U. S. 135, 162 (1892).

(B) English Background

The constitutional principle of equality among all citizens, naturalized and native born alike, was deep rooted in English law prior to the framing of the American Constitution. This same principle was adopted and practiced by the several states between the time of their Declaration of Independence from England and their formation into the United States of America. This was the principle under which the framers of the Constitution lived; this was the principle which they themselves espoused and this was

the principle which they intended to and did embody in the Constitution of the United States.

With respect to English law, Lord Coke, the great English constitutional jurist, laid down the rule that the "alien naturalized to all intents and purposes is as a natural born subject." *Coke on Littleton*, fols. 129a (1628). Chief Baron Hale in 1664 reiterated that naturalization "put them [aliens] in the condition as if they had been born in England"; "naturalization puts them in the same condition as if born here." *Collingwood and Pace*, 1 Vent. 413, 420, 429, 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664).[6]

In *Regina* v. *Manning*, 2 Carr and K. 891, 900, 175 Eng. Rep. 374, 378 (Ex. Ch. 1849), C. J. Wilde observed:

> "By Lord Coke, by Lord Bacon, by Sir Matthew Hale, and by, I believe, every text writer, and in all editions of Blackstone by the various learned editors, it is a proposition universally adopted, that a person naturalized becomes to all intents and purposes a British subject."

The single exception to the doctrine of equality of status for naturalized citizens found in our Constitution, that of eligibility to a public office, is significantly the sole exception with respect to equality found in English law. Thus, Blackstone in 1765 stated: "By this [naturalization] an alien is put in exactly the same state as if he had been born in the Kings ligeance; except only that he is incapable * * * of being a member of the privy council or parliament, holding offices, grants, etc." *Blackstone, Commentaries*, Book I, Ch. 10.[7]

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[6] The importance of reference to the common law and to British institutions as they were when the Constitution was framed and adopted in interpreting the Constitution has consistently been recognized by the Supreme Court. See e.g. *Ex parte Grossman*, 267 U. S. 87, 108-109 (1925); *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653-654 (1897); *Ex parte Bain*, 121 U. S. 1, 12 (1886).

[7] For the statutory basis for this distinction, see 12 and 13 W. 3 C. 2 (1700); 7 and 8 Vict. cc. 66 (1844).

(C) Colonial and Constitutional Convention Background

Upon their severance of allegiance from England and their assumption of sovereignty, the several states expressly embraced the English principle of absolute equality between naturalized and native born citizens except with respect to eligibility to public office.

The laws of Virginia gave those who were naturalized all the rights, privileges and advantages of citizens except that they had to meet certain conditions before qualifying for political office. 7 *Laws of Virginia* 19 (1671), 2 *Hening* 289 (1671). The laws of Maryland, Pennsylvania, Massachusetts and Delaware contained similar provisions. See 6 *Laws of Maryland* 2, 5 (1779); *Herty* 377 (1799); 8 *Stats. At Large of Pennsylvania* 337 (1773); 1 *Private and Special Statutes of the Commonwealth of Massachusetts* 1780-1805, 206 (1805); *House Document 326,* 59th Cong. 2d Sess. 8-11 (1906).

> "The effect of naturalization in the several states before the Constitution was adopted was, therefore, to remove alienage, the person naturalized standing in all respects upon the same plane with a natural-born citizen, except that he was under certain removable political disabilities.
>
> The same principle was applied in constructing the Constitution, and in the debates in the Constitutional Convention no one proposed any other principle. Gouverneur Morris said 'he would let them (naturalized citizens) worship at the same alter (with native citizens), but he did not choose to make priests of them' (*Madison's Writings,* IV, 159), and this was the sentiment which finally resulted in the provision that the President must be a natural-born citizen (Art. II, Sec. 1), and that no one shall be a Representative who has not been a citizen for seven years (Art. I, Sec. 2), or a Senator who has not been a citizen for nine years (Art. I, Sec. 3)." *House Document 326, supra,* p. 9.

During the Constitutional Convention debates as to eligibility for Congressional office, Mr. Gerry stated that he

"wished that in the future eligibility might be confined to natives. Foreign powers will intermeddle in our affairs and spare no expense to influence them." IV *Writings of James Madison (Putnam's Sons* 1906), p. 172. Colonel Hamilton responded:

> "There was on one side the possible danger that had been suggested. On the other side, the advantage of encouraging foreigners was obvious and admitted. Persons of moderate fortunes will be fond of coming here where they will be on a leval with the first class citizens. He moved that the section be so altered to require merely citizenship and inhabitancy." IV *Writings of James Madison, supra*, p. 173-4.

James Madison, the chief draftsman of the Constitution, seconded the motion:

> "He wished to maintain the character of liberality which had been proferred in all the Constitutions and publications of America. He wished to invite foreigners of merit and republican principles among us. America was indebted to emigration for her settlement and prosperity." IV *Writings of James Madison, supra*, p. 174.

Mr. Ghorum observed in this connection that:

> "When foreigners are naturalized it would seem as if they stand on an equal footing with natives." IV *Writings of James Madison, supra*, p. 176.

In response to the argument that the states alone had pledged equality to naturalized citizens, James Madison said:

> "It was said that the United States as such have not pledged their faith to the naturalized foreigners and therefore are not bound. Be it so and that the States alone are bound. Who are to form the new Constitution by which the condition of that class of citizens is to be made worse than the other class? Are not the States ye Agents? * * * Will not the new

Constitution be their Act?" IV *Writings of James Madison, supra*, pp. 176-177.

"We should moreover reduce every State to the dilemma of rejecting it or violating the faith pledged to a part of its citizens." 2 *Farrand, Records of the Federal Convention*, pp. 271-272.

The principle that citizenship by naturalization confers a status in all respects equal to that of citizenship by birth, was, therefore, a principle firmly fixed in the legal background of the delegates to the Constitutional Convention. It was an integral part of that abhorrence of second-class citizenship which led to their own revolt from England. Moreover, as the debates show, there were strong practical reasons why this principle should have been written into the Constitution.

Immigration was vital to the future of the new country,[8] and naturalization was one of the prime incentives to immigration. Any inequality for those achieving their citizenship through naturalization was recognized by the framers as a deterrent to such immigration.

In addition, another chief aim of the Constitutional Convention was to foster unity and harmony among the various states. To empower the Federal Congress, already an object of suspicion in many areas, to derogate from the rights of those who had been naturalized under state laws in the years immediately preceding the Convention would be wholly disruptive of this aim.

Perhaps the most significant evidence that the framers of the Constitution intended to deny Congress the power to make any distinctions between naturalized and natural

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[8] The Declaration of Independence cited as a grievance against George III that "[he] has endeavored to prevent the Population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither * * *."

born citizens was their rejection of a draft empowering Congress to "regulate" naturalization. This draft was interpreted by Madison as giving Congress the power to legislate concerning the enjoyment by the naturalized of the various privileges of citizenship. 2 *Farrand, supra,* 144, 167, 235; 4 *Farrand, supra,* 45. Its rejection, coupled with the specific inclusion of a clause distinguishing between naturalized and native born citizens with respect to eligibility to the Presidency, and the grant of a carefully limited power to naturalize show conclusively that the Founding Fathers deliberately determined not to endow Congress with the power to curtail to any extent the rights and privileges of naturalized citizens in comparison with those possessed by the native born.

(D) Views Subsequent to Adoption of Constitution

All statements concerning the status of naturalized citizens in the period immediately after the adoption of the Constitution bear further evidence that the framers of that document viewed Congress' power to naturalize aliens as conferring a status identical to that of the native born citizen, with the sole exception being specifically set forth in the Constitution.

As early as 1812 when the question arose as to English impressment of American seamen, many of whom were naturalized citizens, Secretary of State James Monroe, recognizing the inability of the United States government to discriminate against naturalized citizens, advised the British Minister at Washington:

> "Your proffered exertions to procure the discharge of native American citizens from on board British Ships of war, of which you desire a list has not escaped attention. It is impossible for the United States to discriminate between their native and naturalized citizens, nor ought your Government to expect it as it makes no such discrimination it-

self." Letter from Monroe to Foster, May 30, 1812, *American State Papers III, Foreign Relations 1787-1828,* 454, 464.

President Madison agreed. He instructed the American Commissioners appointed to conduct the peace negotiations, following the War of 1812 that "By our law, all the rights of natives are given to naturalized citizens." Madison to Binns, February 11, 1813, *Letters and Other Writings of James Madison* (1865) II, 558.

In 1859 Attorney General Black advised President Buchanan that:

> "a native and naturalized American may * * * go forth with equal security over every sea and through every land under heaven, including the country in which the latter was born." 3 *Op. Atty. Gen.* 360 (1858-59).

Attorney General Williams similarly advised President Grant in 1873 that he knew of no principle upon which the rights of natives and naturalized citizens residing abroad could be distinguished. *Foreign Relations of the United States, 1873,* Vol. II, pp. 1216, 1218.

On July 27, 1868, Congress enacted a statute, 15 Stat. 223, Revised Statutes, Sec. 2000, providing:

> "All naturalized citizens of the United States are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."

This legislation was in response to the arrests by the German States of naturalized citizens for non-performance of military service and to the numerous arrests by the English government of naturalized citizens of Irish origin for political offenses. Hundreds of petitions had been sent to Congress from state legislatures and others requesting this enactment. *House Document 326, supra,* pp. 10-11. In

the debates which led to the enactment of the Act of 1868, it was frequently acknowledged that naturalized citizens and native born had the same rights.

Congressman Banks of the Committee on Foreign Affairs who presented the legislation declared:

> "* * * the naturalized citizen has exactly the same right in a foreign Government that a native-born citizen of the United States enjoys. There is no difference. There is no privilege for one that the other may not claim, and it is the first and highest duty of the American Government to accord its protection to the naturalized citizen in exactly the same degree that it does to the native-born citizen. And this bill proposes to establish that principle. It is the first time that it has been proposed in the form of a legislative declaration." *Cong. Globe,* 40th Cong., 2d Sess., p. 832.

Congressman Chanler, agreeing, stated:

> "At home or abroad no distinction exists among American citizens according to all established declarations of this Government. There can be no just distinction in law or fact made between citizens of the same Government and certainly no act of Congress should establish such distinction * * *." *Cong. Globe, supra,* p. 1015.

Congressman Woodward was of a like opinion:

> "By naturalization the foreigner becomes an American citizen, except for one or two purposes, as truly as if he was 'native to the mannor born'. And when he returns to his native country, either for business or pleasure, he is entitled to the same measure of protection that any American citizen has the right to claim." *Cong. Globe, supra,* p. 1018.

Thus, it clearly appears that the sources and guides customarily employed in ascertaining the meaning of the Constitution all point to a purpose not to distinguish be-

tween native or naturalized citizens except with regard to very limited classes of political office. The English law, the laws of the various states at the time of the adoption of the Constitution,[9] the necessities which gave birth to the Constitution,[10] the statements contemporaneous with its adoption, the alternate drafts considered and rejected, and the contemporaneous construction following adoption of the Constitution, all point inevitably to the construction which the amicus urges. They establish that the Constitution must be read as stating that Congress shall have power to pass a uniform rule providing the method whereby aliens can achieve a status equal in all respects to the native born but shall have no other power in connection with the status of naturalized citizens. Specifically Congress shall not have power to impose upon such citizens any limitations or burdens which do not apply equally to native born citizens.

The Fourteenth Amendment to the Constitution, the first comprehensive definition of United States citizenship,[11] serves to underscore that there is only one category of "citizens of the United States" whatever may be the origin or the means of attaining such citizenship. That amendment provides "All persons born or naturalized in the United States * * * are citizens of the United States". Section 352 of the Immigration and Nationality Act of 1952 is wholly inconsistent with this definition of a single indistinguishable class of citizens. That statute is based upon the

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[9] With respect to state law as an aid in the construction of the Constitution, see: *Waring* v. *Clarke*, 46 U. S. 441, 457 (1847); *Marshall* v. *Gordon*, 243 U. S. 521, 534, 535 (1917).

[10] The importance of the needs a particular provision was designed to meet in interpreting the Constitution is pointed out in *Legal Tender Cases*, 79 U. S. 457, 531 (1870); *Knowlton* v. *Moore*, 178 U. S. 41, 95 (1900).

[11] *Slaughter-House Cases*, 83 U. S. 36, 72 (1873).

contrary concept, never a part of our history or of our law, that there are two classes of citizens: "native born citizens of the United States" endowed with a preferred status and "naturalized citizens of the United States" forced to accept an inferior position. Such a thesis should be unequivocally repudiated by this Court.

III

The Immigration and Nationality Act's discrimination between native born and naturalized citizens residing abroad is arbitrary and violative of due process.

The severity of our expatriation laws, their necessity and their discrimination between native born and naturalized citizens may be compared with the requirements of other countries throughout the world. In this connection, it should be remembered that these countries are not restricted by the same constitutional limitations as is the United States.

Of eighty-four countries examined (see Laws Concerning Nationality, United Nations Legislative Series, 1954), only nineteen were found which expatriate for foreign residence. Four countries, Czechoslovakia, Hungary, Pakistan and Yugoslavia, make no distinction between naturalized and native born citizens. Illegal departure may result in expatriation in the first two countries; residence abroad for seven and five years, respectively, without registration expatriate in the other two. Australia, South Africa, and the United Kingdom provide for the expatriation of naturalized citizens remaining abroad for seven years without registration. Seven years' foreign residence may expatriate in Thailand. Israel, Costa Rica, and Nicaragua use seven, six, and five years respectively, but all three require an absence of connections with the country. Canada uses six years' residence abroad with the right to grant

extensions, Ceylon employs five years, Cuba three years without registration, Guatemala two years, Mexico five years in the country of origin, and New Zealand six years with a requirement that expatriation be conducive to the public welfare. In El Salvador residence in the country of origin for two years and in other foreign countries for five years without permission results in loss of nationality by a naturalized citizen. In Liberia similar periods bring about a presumption of loss of citizenship.

We submit, therefore, that our expatriation laws rank high as the most severe and unyielding in the world.

Congress has established a crazy patch quilt of favoritism and discrimination between naturalized citizens residing abroad.

1. Naturalized Americans who acquired naturalization as a result of acquisition of territories or possessions through treaties or acts of Congres are given the same rights of residing abroad as native born citizens. 8 U. S. C. 1485(10).

2. Naturalized citizens who were native born and who were expatriated by marriage to an alien and then reacquired citizenship are likewise given full freedom to reside abroad. 8 U. S. C. 1485(9).

3. Veterans of the Spanish American War or World War I residing abroad in their native land on December 24, 1952, are granted the right to continue such residence. They and all other war veterans have freedom to reside indefinitely in foreign countries other than those of their former nationality. 8 U. S. C. 1486.

4. Naturalized Americans who reside in the United States for ten years during minority and who have a native born spouse or child may reside abroad indefinitely with them. 8 U. S. C. 1485(8).

5. Naturalized Americans sixty years old who resided in the United State for twenty-five years after naturalization are free to reside abroad. 8 U. S. C. 1485(3).

6. Governmental employment, Governmental compensation, business reasons and ill health likewise furnish bases for exemption from foreign residence bans. 8 U. S. C. 1485(1, 2, 4, 5).

These exemptions, except for those based upon Governmental employment, commercial, religious, or educational grounds, were not based upon foreign policy considerations. The possibility of international friction did not preclude exemptions for naturalized citizens from acquired territories, for repatriated women, for veterans, nor for naturalized citizens with ten years residence during minority. Obviously these groups were granted favored treatment because of personal backgrounds. Humanitarian motives have given the sixty year old naturalized citizen the benefit of an exemption. *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, p. 502. We, therefore, question whether the classifications herein can be sustained upon a foreign policy argument.

The distinctions of the expatriation laws should be appraised in the light of the reasons advanced for the legislation here under attack. Historically, our greatest problem has been the involvement with foreign governments who have impressed Americans residing abroad into their military service, who have punished them for non-performance of military duties. We have had this problem, as in the War of 1812, with regard to native born Americans and since that time with native Americans with dual nationality. *III Hackworth, supra*, pp. 352, *et seq.* We have never had this problem with regard to women.

The bar against foreign residence, however, is applied equally to men and women and regardless whether or not they are liable to military conscription abroad. The bar is not applied to dual nationals who take an oath of al-

legiance to the United States (8 U. S. C. 1482) even though their presence abroad may result in conscription. The solution to the international conflicts on military service has been sought and found to a large degree in treaties. *III Hackworth, supra,* pp. 377, *et seq.* Treaties removed the problem originally presented by Great Britain's claim of perpetual allegiance and it removed the difficulties experienced at one time with Prussia. If there is in fact a problem created by the foreign residence of naturalized citizens, the solution lies in the negotiation of treaties with foreign governments to resolve the rights of United States citizens, rather than an arbitrary revocation of citizenship of one class of citizens.

The Committee recommending expatriation of naturalized citizens for foreign residence, itself urged in support of this provision that it would encourage naturalization treaties. Experience does not justify the statute on this ground, for no additional treaty has been prompted by our 1940 or 1952 expatriation laws.

Moreover, the expatriation provisions conflict with most of our treaties which provide for the presumptive loss of citizenship by two—not three years residence in the country of former nationality. See *III Hackworth, supra,* p. 414.

Our expatriation laws were suggested to prevent improper naturalization. Denaturalization laws and proper enforcement of our naturalization requirements are the answer to this situation. 8 U. S. C. 1451(d). Preventing the transmission of citizenship to children born abroad was likewise advanced as a ground for this legislation. However, regulation of these cases is controlled by 8 U. S. C. 1401(a)(7) under which petitioner has already conferred citizenship upon her sons born in Germany. Finally, it is contended that naturalized citizens residing abroad tend to renew "old associations and ways of living and thinking". We submit that this is not a proper subject for the control

of Congress either while the naturalized citizen resides abroad or at home.

Two questions are posed by the problem presented here:

First, is it reasonable for Congress to restrict residence abroad by all citizens merely because of ordinary difficulties encountered by the State Department in protecting their interests while they remain in foreign lands? "The right to travel is a part of the 'liberty' of which a citizen cannot be deprived without due process of law of the Fifth Amendment. * * * 'Our nation' wrote Chafee, 'has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases'." *Kent, et al.* v. *Dulles*, 357 U. S. 116, 125, 126 (1957).

In *Perez* v. *Brownell*, 356 U. S. 44, 58 (1957), this Court stated:

> "Since Congress may not act arbitrarily a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs."

It must, therefore, be conceded that citizens of the United States may not be denied residence abroad capriciously.

Second, is the denial of residence abroad based upon arbitrary grounds? Is the classification between native born and certain types (but not all) of naturalized citizens arbitrary?

The Government admits in its Memorandum filed in response to the Petition for Certiorari herein that varying treatment of different groups may be upheld, "upon a showing that the classification was reasonably devised to meet a demonstrated need". The demonstrated need is said to be the greater *possibility* that residence abroad by

naturalized citizens would produce international disputes (pp. 11, 12).

The classification is based upon place of birth and is applied only to some not so favored naturalized citizens. Such a classification should have compelling basis to withstand constitutional attack. As this Court stated in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943):

> "Distinction between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Judge Edgerton, dissenting, observed in the same vein that:

> "Distinction because of birthplace are equally arbitrary." *Lapides* v. *Clark*, 176 F. 2d 619, 623 (C. A. D. C., 1949).

Four criteria usually applied in determining the reasonableness of a classification are (1) the deprivation involved; (2) the conditions existing prior to the legislation; (3) the possibility of achieving the same benefits at a lower price; and (4) effectiveness of the new legislation to improve conditions. *The Consideration of Facts in "Due Process Cases"*, 30 Col. L. Rev. 360 (1930). An analysis based upon these criteria demonstrates the utter constitutional failure of Section 352 of the Immigration and Nationality Act of 1952.

1. *The Deprivation Involved.* This Court has referred to the right of American citizenship as "no less precious than life or liberty, indeed * * * one which today comprehends those rights and almost all others." *Klapprott* v. *United States*, 335 U. S. 601, 616 (1949). American citizenship has also been called "the highest hope of civilized men." *Schneiderman* v. *United States*, 320 U. S. 118, 122 (1943); and "all that makes life worth living." *Ng Fung Ho* v. *White*, 259 U. S. 276, 284 (1922).

Loss of citizenship is particularly important where it results not only in loss of certain civil and constitutional rights but in the infinitely greater penalty of exile and banishment from the United States. This is the effect of Section 352. The individual deprived of citizenship by that section, since he is already outside the United States and not permitted to return, loses in one fell swoop all rights, advantages and opportunities possessed by those living in the United States whether they be citizen or alien. Even the sponsors of the present legislation acknowledged that it "may appear to be somewhat drastic." *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, p. 495.

2. *Conditions Existing Prior to the Legislation.* Where such basic rights and principles are at stake an affirmative showing must be made that a reasonable need exists for the statute in question. This means that in order to justify Section 352 and assuming for the purposes of argument only that naturalized citizens may be treated differently from native born, it must be shown that there is a reasonable need for the discriminatory classification. Was there a reasonable need to prevent the residence abroad in lands of former nationality of naturalized American women, like petitioner? Every one of the thirteen cases cited by the State Department as illustrating the need for the legislation herein involved a male citizen. *Hearings on H. R. 6127, superseded by H. R. 9980, supra*, pp. 497-501. Nor do the cases reveal the pendency of any international disputes caused by foreign residence. The foreign conflicts of an earlier era over military conscription of our male citizens had been solved by naturalization treaties. Such foreign conflicts never had related to American women. Moreover, the legislative history here does not explain the details of any alleged international complications with any named countries. On the contrary, it only speaks of "difficulties and embarrassment to the Government of the United States". *Ibid.*, p. 495. Specificity is lacking. Finally, as we observed, *supra*, discrimination and favoritism between

naturalized citizens residing abroad are not based upon foreign policy considerations. We, therefore, submit that conditions existing at the time this legislation was enacted did not call for the invocation of our power to regulate foreign affairs by terminating the citizenship of naturalized Americans.

3. *The possibility of Achieving the Same Benefits at a Lower Price.* Before Congress may pass and this Court sanction legislation which is so serious an invasion of individual rights and so great a perversion of the traditional principle of the equality of all citizens, it is incumbent upon them to consider the alternative means already available to combat the alleged "evil" sought to be remedied. *Schneider* v. *Irvington*, 308 U. S. 147, 162 (1939); *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5 (1937). See also *Thomas* v. *Collins*, 323 U. S. 516, 532 (1944); *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1939).

In the case of the legislation at bar ample means exist to prevent the prolonged residence of naturalized citizens abroad from resulting in international complications. As the then Chief of the Passport Division pointed out in 1950, after criticizing the present stringent legal requirements imposed on naturalized citizens abroad, "The Secretary of State always has the power to withdraw American protection from many native or naturalized citizens whose actions abroad are inimical to the best interests of the United States." See statement of Mrs. Ruth B. Shipley, *supra*. Such was the course pursued for over one hundred years prior to the present enactment.

With respect to those persons whose prolonged residence abroad follows so soon after American naturalization as to create a presumption that naturalization was not obtained in good faith, denaturalization proceedings may be instituted and the naturalization certificate canceled under 8 U. S. C. 1451(d). Strict enforcement of our natu-

ralization requirements—a situation presently in existence—has prevented the grant of acquired citizenship to *mala fide* applicants.

The transmission of citizenship by naturalized persons residing abroad has likewise been controlled by other sections of the law. A naturalized citizen married to an alien, as in petitioner's case, cannot transmit citizenship unless he has been physically present in the United States for ten years, at least five of which were after attaining the age of fourteen years. 8 U. S. C. 1401(a)(7).

Finally, as we have stated before, the legislation here under attack was neither needed for, nor did it ever bring about, the execution of a single treaty.

Thus it can be seen that the discrimination worked by Section 352 is unreasonable not only because the evil it was designed to remedy has been shown to be hypothetical but because that evil even if it became a reality could be adequately met by other legislation already in existence. "The people through their legislatures may protect themselves against * * * abuse * * *. The legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5 (1937).

Analysis having revealed a complete absence of abuse in the instant situation and having indicated ample safeguards against such abuse should it arise, the alleged "legislative justification" relied on to uphold the constitutionality of Section 352 disappears.

4. *Effectiveness of Legislation to Improve Conditions.* Ruth Shipley, former Chief of the Passport Division, has advised us of the injustices caused by the present legislation. There has been no showing whatever that the discrimination which it imposes upon naturalized citizens has in any way lessened international friction. Absent such a showing, even were the discrimination within the constitutional power of Congress, it must be held unwarranted.

CONCLUSION

Section 352 has been revealed as arbitrary and discriminatory legislation which strikes at one of the basic tenets of our republic—the equality of naturalized and native born citizens. It should be invalidated as unconstitutional legislation.

Respectfully submitted,

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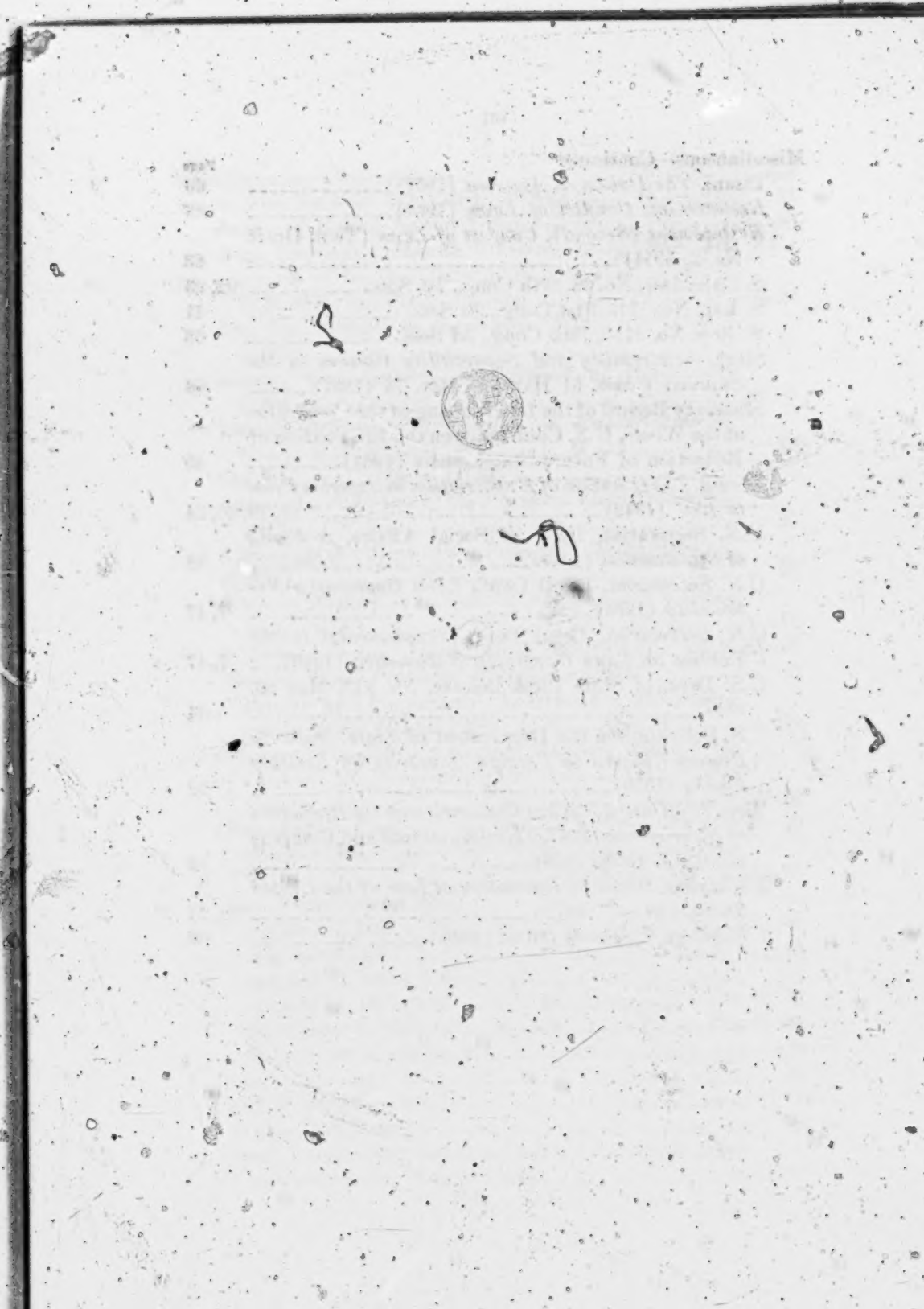

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, APPELLANT

v.

DEAN RUSK, SECRETARY OF STATE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the three-judge district court (R. 32–37) is reported at 218 F. Supp. 302.[1]

JURISDICTION

The judgment of the district court was entered on June 7, 1963 (R. 67–68). Notice of appeal to this Court was filed in the district court on June 27, 1963 (R. 68–69), and probable jurisdiction was noted on October 28, 1963 (R. 70). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

[1] The earlier *per curiam* opinion of this Court, remanding the case to the district court for consideration by a three-judge panel, is reported at 372 U.S. 224.

QUESTION PRESENTED

Whether Section 352(a)(1) of the Immigration and Nationality Act, providing for loss of United States nationality by a naturalized citizen who resides continuously for three years or more in the foreign state of which he was formerly a national, is constitutional.

STATUTES INVOLVED

Sections 101, 352, 353, and 406 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 170, 269–270, 73 Stat. 274, 8 U.S.C. 1101, 1484–1485, provide in pertinent part as follows:

> SEC. 101. (a) (33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.
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> * * * * *
>
> SEC. 352. (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;

(2) having a continuous residence for five years in any foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.

* * * * *

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States

exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance: *Provided,* That in such case the person having his residence abroad shall, at least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child: *Provided,* That in the case of the death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is the spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1), (5) or (6) of this section, or paragraph (2) of section 1486 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period of [or] periods

totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States: *Provided*, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804 (b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

* * * * *

SEC. 406. If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

STATEMENT

Appellant was born of German parents on May 28, 1934, in Bavaria. She was a German national at birth (R. 2). In 1939 or 1940 she came to the United States with her parents to live, and later, in December 1950, she acquired derivative American citizenship through her mother (R. 2, 17).[1] Appellant went

[1] Although the record is silent, the files of the Immigration and Naturalization Service show that appellant's mother acquired American citizenship through naturalization in 1947, that her father never became an American citizen, and that her mother died in 1947 and her father in 1950.

abroad in 1954 and spent the next two years studying in Switzerland and France (R. 2). In February 1956, while in France, she became engaged to a West German national. She returned to the United States in April of that year, remained here for two months, and then departed for West Germany, where she was married in July 1956 and where she has resided ever since (R. 2, 10). In 1959 the United States denied further extension of the passport appellant had held since 1954. The Department of State certified that she had lost her American citizenship under Section 352(a)(1) of the Immigration and Nationality Act of 1952 (66 Stat. 269, 8 U.S.C. 1484(a)(1), *supra*, p. 2) by residing continuously for three years in the foreign state of which she was a national before her naturalization in the United States (R. 3, 14–16). This decision was affirmed by the Department's Board of Review on the Loss of Nationality in January 1960.

At the present time, appellant is living in a suburb of Cologne, West Germany, with her husband—who is a partner in a law firm located in the city—and her four sons[3] (R. 1, 2, 7, 10). She intends to continue living in Germany—that is "to remain with my husband and our children in Germany where he practices his profession" (R. 8). She explains that (R. 10):

> I intend to live with my husband and to go with him wherever he may be. Since his law practice is in Cologne, it appears likely that he and I will remain there for the indefinite future,

[3] The brief for appellant states that two sons were born after these proceedings commenced (Br. 6).

> although I would hope to be able to go to the United States frequently.

Since her marriage in 1956, she has returned to this country on two occasions: a visit of six weeks in 1957 and another visit in 1960 (R. 10).[4] From the time of the loss of her American citizenship, appellant has resided in West Germany under papers identifying her as a stateless person (R. 4, 11). Her trip to the United States in 1960 was likewise with papers indicating that she was a stateless person. The record does not indicate whether appellant has lost the German citizenship she acquired at birth; whether she has made any claim to German citizenship; or whether she has contested her classification as a stateless person.[5]

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[4] The record is silent as to the second visit to this country, but appellant's brief indicates that such a visit did occur in 1960 (Br. 41).

[5] Under Sections 19 and 25 of Germany's Nationality Act of 22 July 1913 (see U.N. Secretariat, Legal Dept., *Laws Concerning Nationality*, 178–185 (1954)), it appears that a *minor*, unlike an adult, does not divest himself of German citizenship by the act of voluntarily acquiring foreign citizenship; a minor can lose German citizenship only by applying to and securing the approval of a German court of law or the government. Appellant was sixteen years old when she acquired derivative American citizenship (R. 2), and the record makes no mention of her having secured the consent of either a German court or the government to giving up her German citizenship. Under these circumstances, it is doubtful whether she ever lost her status as a German citizen.

Even if appellant were not a German citizen at the present time, she could claim naturalization in Germany on an expedited basis because she is married to a German national. Art. II(1), Third Settlement of the Nationality Questions, Act of 19 August 1957 (see U.N. Secretariat, Legal Dept., *Supplemental to the Volume on Laws Governing Nationality* 43–44 (1959)). See also App. Br. 7.

Appellant's two sons who were born in Germany in 1957 and 1958 are dual nationals, having acquired German citizenship by virtue of their father's nationality and American citizenship through their mother under Section 301(a)(7) of the Immigration and Nationality Act of 1952 (66 Stat. 235, 8 U.S.C. 1401 (a)(7)). The two sons born since the proceedings were commenced are also German citizens through their father. However, their American citizenship, unlike that of their older brothers, depends on the outcome of this case since their American citizenship derives from their mother and they were born after the Department of State had determined that appellant had lost her citizenship.

In February 1960, appellant brought an action in the United States District Court for the District of Columbia to enjoin the Secretary of State from enforcing Section 352(a)(1), and to secure a declaratory judgment that she is a citizen of the United States (R. 1–5). The district court denied her motion to convene a three-judge district court and entered judgment on the pleadings for respondent (R. 27). The court of appeals affirmed *per curiam* (R. 28–29). On writ of certiorari to this Court, judgment was vacated and the cause remanded to the district court for hearing before a three-judge panel, this Court holding that the constitutional questions presented "were not plainly insubstantial" (R. 29–30; 372 U.S. 224). The three-judge district court, one judge dissenting, entered judgment for respondent on the pleadings, holding that Section 352(a)(1) is with-

in Congress' power and is therefore constitutional (R. 32–67; 218 F. Supp. 302).

SUMMARY OF ARGUMENT

The history and background of Section 352(a)(1) show that over a period of many years this government has been seriously concerned by the special problems engendered when naturalized citizens return for a prolonged period to the country of their former nationality. The statute comes within Congress' power over foreign relations because other nations frequently attempt to treat such persons as their own citizens, thus embroiling the United States in serious conflicts when it attempts to afford them protection. Congress could reasonably decide upon the remedy of expatriation, rather than the withdrawal of diplomatic protection, in order to end all American responsibility and involvement. Moreover, Congress can reasonably protest against the tendency of three years' residence in a naturalized citizen's former homeland to weaken his allegiance to the United States. This allegiance is likely to be alienated, at least in substantial part, when a naturalized citizen returns to the country where he was born and spent much of his life.

Hence it is not invidious discrimination for Congress to treat naturalized citizens returning to the country of their former nationality differently from the manner in which it treats native-born citizens. Since the problems are sufficiently general and serious to justify Congress' judgment that this category of naturalized citizens warrants separate treatment, appellant's suggestion that her personal situation does not fall within the reasons for the legislation is

irrelevant. Congress had a right to legislate with respect to the general class without regard to each factual variation. Moreover, considering the particular circumstances in this case, Congress could expatriate persons who return to their former homelands without an intent to return to this country to live, and therefore the statute is constitutional as applied here.

Finally, the statute is not penal, either in intent or in effect. Plainly, naturalized citizens who merely reside for three years in the countries of their origin, have committed no criminal or reprehensible act. The legislative history of Section 352(a)(1) demonstrates unequivocally that, unlike the situation in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, Congress was aiming only to regulate and not to punish. It did so in a manner which has been deemed appropriate not only by this country, but by many others, and is in keeping with our traditional concepts of citizenship.

ARGUMENT

INTRODUCTION

The decisions of this Court firmly establish the power of Congress to enact expatriation statutes. In *Mackenzie* v. *Hare*, 239 U.S. 299, the Court sustained a statute taking away during coverture the citizenship of an American woman who married a foreigner. In *Savorgnan* v. *United States*, 338 U.S. 491, the Court upheld a statute which provided that being naturalized in a foreign state or taking an oath of allegiance to a foreign sovereign would result in loss of citizenship. And in *Perez* v. *Brownell*, 356 U.S. 44, the Court held that it was within the constitutional power

of Congress to make voting in a foreign election an act of expatriation. The power of Congress to enact the statute involved in this case—Section 352(a)(1) of the Immigration and Nationality Act of 1952, providing for the expatriation of naturalized citizens who reside in their countries of origin for three or more years—has not previously been before the Court. While Congress has also provided in Section 352(a)(2) for the expatriation of naturalized citizens who reside in any foreign country for *five* years or more,* the sole issue here is the constitutionality of Section 352(a)(1), which deals with residence in the country of origin.

This Court, in *Perez*, explicitly described the central issue in expatriation cases (356 U.S. at 58):

> The inquiry—and, in the case before us, the sole inquiry—into which this Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power [to regulate foreign relations] and the ultimate legislative action.

Similarly, in *Trop* v. *Dulles*, 356 U.S. 86, 105, Mr. Justice Brennan, in his concurring opinion, stated that "as in *Perez* v. *Brownell*, we must inquire whether there exists a relevant connection between the particular legislative enactment and the power granted to Congress by the Constitution." Since American citizens voting in foreign elections might reasonably be found to create frictions and embarrassments against

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*Section 352(a)(2) was sustained in *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860.

which Congress might regulate under the foreign affairs power, the Court held in *Perez* that there was a "rational nexus" existing between the means—expatriation—and the ends sought to be achieved. 356 U.S. at 57–58.

The Court further observed in *Perez* that, in determining whether a "relevant connection" existed, it was not irrational for Congress to interpret voting in a foreign election as (356 U.S. at 61):

> importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

On the basis of this language, appellant contends (Br. 61) that "*Perez* clearly means that Congress has a power to attach expatriation only to acts which are inconsistent with allegiance and through their political nature connote allegiance to a foreign country." Even if the language of the *Perez* case did lend itself to appellant's construction, the holding of that case is of no avail to her. Surely voting in a foreign election—a single act quickly done and easily forgotten—is more consistent with allegiance to the United States than prolonged residence in one's native country, abandoning virtually all ties to the country which she temporarily adopted.

Moreover, *Perez* does not support appellant's legal position that a transfer of allegiance is a condition of expatriation. It said, rather, that the fact that voting in foreign elections implies allegiance to another country "is not without significance." 356 U.S. at

60. Previously, however, the Court made clear that "[t]*he critical connection* between [voting in foreign elections] and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations" (emphasis added). *Ibid.* This is consistent with the basic rule, expressed in the *Mackenzie* and *Savorgnan* cases, that Congress may attach loss of citizenship to a voluntary act of a citizen, where the action bears a reasonable relationship to any of Congress' granted or implied powers. Thus, Congress has the power to expatriate not only pursuant to its powers relating to citizenship on the basis of a transfer of allegiance to another country, but also pursuant to its broad powers over foreign affairs.

To say that the citizen's act must be "voluntary" is not to say that the citizen must have a specific intent to expatriate himself. See *Perez* v. *Brownell, supra,* 356 U.S. at 61. Quite the contrary, the petitioner in the *Mackenzie* case "had not intended to give up her American citizenship" when she committed the expatriating act (*Savorgnan* v. *United States, supra,* 338 U.S. at 501); and the petitioner in the *Savorgnan* case "had no intention of endangering her American citizenship or of renouncing her allegiance to the United States" (*id.* at 495). Thus, it is irrelevant that appellant did not intend to renounce her American citizenship by residing in Germany for three years. Her desire both to live in her native

country and to retain her American citizenship is not different from the desire of the petitioner in *Savorgnan* to be a citizen of Italy as well as a citizen of the United States. The question in both cases is whether Congress can expatriate those who engage voluntarily in specified conduct. There is no question that appellant engaged in conduct—protracted residence in the country of her former nationality—to which Congress has attached expatriation as a consequence, and there is no question that she intended to engage in that conduct.

Accordingly, the basic issue in this case is whether there is a rational nexus between one or more of Congress' granted or implied powers and loss of citizenship. We will show that Congress was acting under its broad powers to regulate foreign relations and citizenship and that there is a rational connection between the exercise of these powers and expatriation.[1] We will then show that the decision of Congress to confine the statute to naturalized citizens residing in their former homelands was directly related to the problems confronting it and therefore was a reasonable classification consistent with the due process clause.

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[1] The two powers may, of course, be considered together as well as separately. This Court has stated (*Legal Tender Cases*, 12 Wall. 457, 534): "[T]he existence of any power claimed for the Federal government * * * may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred."

I

SECTION 352(a)(1) IS A REASONABLE EXERCISE OF CONGRESSIONAL POWER TO LEGISLATE CONCERNING CITIZENSHIP IN A MANNER WHICH WILL AVOID A SERIOUS SOURCE OF INTERNATIONAL DISPUTE

A. SECTION 352(a)(1) IS THE CONSIDERED PRODUCT OF YEARS OF EXPERIENCE IN DEALING WITH THE PROBLEMS ATTENDANT UPON THE RETURN OF NATURALIZED CITIZENS TO THEIR HOMELANDS

Expatriating naturalized citizens who return to their native lands to reside is not a recent innovation. Since the practice has a long history, it can only be properly evaluated after an examination of the relevant historical materials.

1. The Constitutional and Early Background

At the time the Constitution was adopted,[8] the United States had inherited from England the concept of citizenship. Lord Coke, in his landmark opinion in *Calvin's Case*, 7 Co. Rep. 1a, 77 Eng. Rep. 377 (1608), formulated two principles: (1) that rights conferred by naturalization or endenization were subject to the conditions and limitations reserved in the instrument granting those rights,[8] for, to use Coke's

[8] At common law a person born outside the realm could acquire citizenship either by naturalization (which required a special act of parliament, similar to a private law today), or by endenization (which consisted of a grant from the king). Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland* 38–40 (1957); Cockburn, *Nationality* 27–28 (1869); *Calvin's Case*, *supra*, 7 Co. Rep. at 5b–6a, 77 Eng. Rep. at 383–384. Prior to *Calvin's Case* the legal status of a naturalized or endenized person was quite uncertain. Parry, *supra*, pp. 39–40. Except for an unsuccessful and short-lived attempt in 1708, England did not have a general naturalization statute until 1844. *Id.* at 65–66.

maxim, *"cujus est dare, ejus est disponere"* (he who gives anything can direct how the gift is to be used); and (2) that no citizen could renounce his citizenship without the consent of the Crown. See also 1 Blackstone, *Commentaries* 368–369 (Tucker ed., 1803). The first of these principles was made effective in England by imposing specific conditions in all grants of naturalization. See Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland* 57–71 (1957); Cockburn, *Nationality* 29–32 (1869). From 1700 to 1844, all instruments conferring citizenship contained a clause disabling naturalized citizens from holding public office or from taking grants from the Crown. *Ibid.* Under a statute enacted in 1744, naturalized citizens who had not resided in England for seven years could not claim treaty rights available to other citizens doing business abroad. Parry, *supra*, p. 68. The second of these concepts was not reciprocal between the citizen and the Crown. The Crown could and did under various statutes expatriate citizens over their protests even when no specific condition was attached to the grant of naturalization. Foreign residence was one such ground for expatriation. In the seventeenth century, it was believed that residence abroad without the consent of the government constituted a breach of allegiance, and a 1719 statute expatriated "artificers and manufacturers" who resided abroad in disobedience to an order to return. Parry, *supra*, pp. 47–48, 66.

The idea that naturalization includes some limitations is reflected in the American Constitution. Under Article II, Sec. 1, a naturalized citizen may not

become President; under Article I, Sec. 2, he must wait at least seven years after he obtains his citizenship before he is eligible to sit in the House of Representatives; and under Article I, Section 3, at least nine years before he can sit in the Senate. While Madison and Hamilton opposed writing such conditions into the Constitution, one of their reasons was, in Madison's words, that it was unnecessary "because the Natl. Legislre. is to have the right of regulating naturalization, and can by virtue thereof fix different periods of residence as conditions of enjoying different privileges of Citizenship." 2 Farrand, *The Records of the Federal Convention of 1787*, 235 (1911); see *id.* at 268 (Hamilton's view); see, generally, *id.* at 235–239, 268–272. Thus, it was recognized by the framers of the Constitution that at least some of the benefits of naturalization might depend on maintaining an American domicile.

During debate on the first naturalization bill in the First Congress, where the question at issue was whether a residence requirement should be established for naturalization, Alexander White of Virginia suggested that, if the residence requirement were stricken, "another clause ought to be added, depriving [naturalized] persons of the privilege of citizenship, who left the country and staid abroad for a given length of time." 1 Annals of Cong. 1110 (1790). John Lawrence of New York then rose and suggested that the three conditions on naturalization written into the text of the Constitution might be exclusive and questioned whether Congress had the power to impose additional

conditions. *Id.* at 1111. The next speaker, James Madison, responded (*id.* at 1112):

> It may be a question of some nicety, how far we can make our law to admit an alien to the right of citizenship, step by step; but there is no doubt we may, and ought to require residence as an essential.

Four other members of the House (Smith, Hartley, Tucker, and Stone) rose in support of Madison's view that Congress had the power to enact "step-by-step" or "progressive" naturalization—that is, to withhold various rights of citizenship, such as voting and serving in legislatures, until the person had been resident for a certain term of years subsequent to naturalization—pointing out that this merely reflected the practice prevalent in the States at that time. *Id.* at 1112–1118. The propriety of step-by-step naturalization was not further questioned.[9] There is no suggestion that White's proposal was thought by any Congressman to violate the Constitution.

The Constitution does not specifically deal with loss of United States nationality by either native-born or naturalized citizens. However, questions promptly arose in connection with the rights of those who chose residence in the United States to be deemed free of

[9] Eighteen years later, in 1808, a bill was reported out of committee, but not debated in the House of Representatives, which would have expatriated all citizens residing abroad. 18 Annals of Cong. 1871 (1808); Tsiang, *The Question of Expatriation in America Prior to 1907*, 56 (1942).

any allegiance to the country of their origin. This became a political issue between the Hamiltonians, who urged adherence to the common-law principle of perpetual allegiance, and the Jeffersonians, who contended that all men had a natural right to renounce citizenship.[10] See Tsiang, *The Question of Expatriation in America Prior to 1907*, 25–28 (1942); Morrow, *The Early American Attitude Toward the Doctrine of Expatriation*, 26 Am. J. Int'l L. 552, 552–555 (1932). The Jeffersonian defense of the right to renounce citizenship was that emigration, and resulting foreign residence, dissolved the ties binding a citizen to his government, thereby rendering him free to expatriate himself. See Letter from Secretary of State Jefferson to Morris (1793), 1 *American State Papers: Foreign Rel.* 169 (Lowrie ed., 1832). The question of the right to renounce citizenship acquired at birth was, of course, a serious one during the War of 1812. Indeed, in 1814, the administration prepared for the impending peace negotiations by circulating an anonymous pamphlet, *A Treatise on Expatriation* (1814), which went so far as to declare that emigration with an intent to reside abroad permanently *ipso facto* con-

[10] The controversy remained political, for although some lower courts expressed opinions on both sides, the Supreme Court refused to decide the question. See, *e.g.*, *Murray* v. *The Schooner Charming Betsy*, 2 Cranch 64, 120; *Talbot* v. *Jansen*, 3 Dall. 133, affirming *sub nom. Jansen* v. *The Vrow Christina Magdalena*, 13 Fed. Cas. 356 (No. 7,216) (D. S.C.); *Williams' Case*, 29 Fed. Cas. 1330 (No. 17,708) (C.C.D. Conn.).

stituted expatriation without the necessity of formally acquiring another nationality."[11]

The importance which was attached to residence during this early period is also reflected in judicial decisions. In *The Dos Hermanos*, 2 Wheat. 76, a prize case decided in 1817, Justice Story, ruling that the claimant was not entitled to relief because he was an American citizen, reasoned that the claimant was born an American citizen and that, even if he had been naturalized abroad, he reacquired American citizenship on returning to this country and establishing domicile. *Id.* at 98. On the other hand, in *Chacon* v. *Eighty-Nine Bales of Cochineal*, 5 Fed. Cas. 390, 393 (No. 2,568) (C.C.D. Va.), affirmed on other grounds *sub nom. The Santissima Trinidad*, 7 Wheat. 283, the court (Chief Justice Marshall) said in *dictum* that American citizenship, once lost, can only be reacquired by naturalization. In *Alsberry* v. *Hawkins*, 39 Ky. 177, the court held that, in the absence of evidence to the contrary, it would be inferred that a person domiciled in a foreign country had acquired

[11] The administration commissioned George Hay, who was United States Attorney for Virginia and Secretary of State Monroe's son-in-law, to write the pamphlet. It was printed in the government printing office, and circulated and franked by Monroe. Tsiang, *supra*, p. 53; Morrow, *supra*, p. 561; Lowell, *Review of A Treatise on Expatriation by George Hay, Esquire* 3–4 (1814). The thesis, as expressed in Hay's own words, was (*A Treatise on Expatriation*, *supra*, p. 21): "Expatriation, I must repeat, is nothing more than emigration with an intention to settle permanently abroad." The Lowell work was a Federalist response exposing the Administration's participation in the preparation of Hay's circular and attacking its historical validity.

the citizenship of that country and had abandoned American citizenship.

2. Nineteenth Century Problems in Foreign Relations Arising From the Return of Naturalized Citizens to their Former Countries

In the nineteenth century, citizenship problems of a different kind became manifest. Naturalized citizens residing for extended periods in their native countries became sources of embarrassment and conflict in the conduct of America's foreign relations. Many nations did not recognize foreign naturalizations, and would, when their former nationals returned, draft them into military service, charge them with political crimes,[12] refuse to allow them to leave the country, or make other demands based upon the former ties of allegiance. When so treated, the naturalized citizen would often petition the United States for assistance or diplomatic protection. American representations on behalf of naturalized citizens

[12] Prosecution for political crimes arose because naturalized citizens were often politically hostile to the governments of their former countries. Two significant factors in the rise of American immigration in the nineteenth century were the potato famine in Ireland—which left bitter feelings in Ireland against the British government—and the collapse of democratic movements in Prussia and Austria when reaction set in after the Revolutions of 1848. See 1 Morison and Commager, *The Growth of the American Republic* 503 (5th ed., 1962); Handlin, *Immigration as a Factor in American History* 20–31 (1959). Thus, Prussia was particularly hostile to her former nationals who returned after being naturalized in the United States, for Prussia believed that they returned as agents of the "German democratic propaganda" and "flaunted their Americanism in the face of the authorities." 2 *Foreign Rel. U.S.* 1294 (1873).

residing in their country of origin were often flatly rebuffed. For when a particular state refused to recognize an American's naturalization, it would generally refuse also to recognize this country's right to protect such a person.[13] The result, in many cases, was either embarrassment of the United States or controversy with the foreign government. See, *e.g.*, 3 Moore, *Digest of International Law* 562–715, 735–757, 766–771 (1906); 2 Wharton, *Digest of International Law of the United States* 360–393 (2d ed., 1887); 2 *Foreign Rel. U.S.* 1293–1325 (1873).

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[13] Prussia, for example, was obdurate in refusing to recognize American protests on behalf of naturalized citizens. See, *e.g.*, 2 *Foreign Rel. U.S.* 1293–1298 (1873); S. Exec. Doc. No. 38, 36th Cong., 1st Sess.

The friction in various countries was often quite serious. Between 1831 and 1912, protection of American citizens, both native-born and naturalized, resulted in the following: the United States made a show of naval force in the Near East after American citizens had been massacred in 1858, and took similar action near Haiti in 1888 to protect the rights of citizens residing there; American ships enforced citizens' rights by firing on Japanese and Brazilian naval vessels in 1863 and in 1893; trade rights for American residents abroad were acquired and enforced by landing troops twice in Japan in 1853 and 1864; and in order to protect, or retaliate for past injuries to, the property and lives of American citizens and government personnel, this country landed troops once on Argentine soil (1831), once in Chile (1891), three times in China (1854, 1859, and 1900), once in the Dominican Republic (1903), once in Egypt (1882), twice in Honduras (1907 and 1910), once in Japan (1868), three times in Korea (1871, 1888, and 1894), once in Mexico (1876), three times in Nicaragua (1854, 1894, and 1910), once in Panama (1860), and three times in Uruguay (1855, 1858, and 1868). U.S. Solicitor for the Department of State, *Right to Protect Citizens in Foreign Countries by Landing Forces* 51–78 (1929).

Despite the difficulties involved, it has traditionally been this country's foreign policy to extend diplomatic protection to all citizens, both native-born and naturalized. See, *e.g.*, Letter from Secretary of State Madison to Monroe (1804), 3 *American State Papers, supra*, pp. 85–86; *Morrow, supra*, p. 561. Refusal to grant protection and other services was considered degrading to the dignity of a nation committed to the defense of the rights of its citizens. See, *e.g.*, Letter from Secretary of State Seward to Wright (1865), 3 *Foreign Rel. U.S.* 68–69 (1865); Letter from Secretary of State Marcy to Daniel (1855), 3 Moore, *supra*, pp. 569–570. Nonetheless, the Department of State early settled on the policy of withdrawing diplomatic protection from naturalized citizens domiciled in their native states. *E.g.*, Letter from Secretary of State Adams to Shaler (1818), 3 Moore, *supra*, pp. 735–736; Letter from Minister to Prussia Wheaton to Knocke (1840), S. Exec. Doc. No. 38, 36th Cong., 1st Sess. 6; Letters from Secretary of State Fish to Wing (1870–1871), 2 Wharton, *supra*, pp. 361–362; Circular issued by Secretary of State Hay to American diplomats (1889), 3 Moore, *supra*, p. 950. This policy was no doubt influenced by the tradition that naturalization is subject to conditions and by Jeffersonian thought on the relationship between foreign residence and citizenship. In any event the Department pro-

tected all citizens abroad, except for naturalized citizens residing in their countries of origin."[14]

Shortly after the Civil War, the problem of naturalized citizens residing in their native countries became quite critical: in Prussia large numbers of naturalized American citizens were being conscripted into the army and in Great Britain—where the doctrine of perpetual allegiance was followed—many naturalized citizens who had returned to Ireland were arrested and charged with complicity in the Fenian revolt. See, *e.g.*, Cong. Globe, 40th Cong., 2d Sess. 831–832, 969, 1015–1018, 1098–1099, 1105–1106, 4212 (1868).

In 1868 Congress responded to these events by enacting "An Act concerning the Rights of American Citizens in foreign States,"[15] Rev. Stat. §§ 1999–2001

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[14] Although the general practice was to deny protection to naturalized citizens in the countries of their origin, some Secretaries of State followed a different policy. For instance, when James Buchanan was Secretary of State and President, the Department pressed protection claims vigorously on behalf of naturalized citizens who had returned to their native countries. See, *e.g.*, 2 *Foreign Rel. U.S.* 1301 (1873); 3 Moore, *supra*, pp. 566–567.

Occasionally, native-born citizens were also denied protection, but they had to commit other acts in addition to being domiciled abroad. *E.g.*, 14 Op. Att'y Gen. 295, 298–299; Letter from Secretary of State Fish to Grant (1873), 2 *Foreign Rel. U.S.* 1191 (1873); see also Tsiang, *supra*, p. 107.

[15] "Sec. 1999. Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that

(1875), which declared that "the right of expatriation is a natural and inherent right of all people," and that naturalized citizens traveling abroad should be extended the same diplomatic protection as native-born

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such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

"Sec. 2000. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of person and property which is accorded to native-born citizens.

"Sec. 2001. Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

Due to an oversight, the 1868 statute was omitted from the 1958 edition of the United States Code. However, it is still in force and is considered by the Department of State to be determinative of its policies.

citizens."[15] The purpose of the Act was to induce other countries to abandon their claims against persons naturalized in the United States. Cong. Globe, *supra*, p. 2312.

When the 1868 Act was reported out of the House Committee on Foreign Affairs, it explicitly provided that protection would not be accorded to certain classes of citizens, including citizens (both native-born and naturalized) who had resided abroad continuously for five years, citizens who had not paid taxes to the United States, citizens who served in foreign armies, and naturalized citizens who returned to their native countries with the intent to reacquire a domicile there. Cong. Globe, 40th Cong., 2d Sess. 783, 831. Domicile was defined as five years' continuous residence or becoming established in a business which manifested an intent to resume permanent residence. *Ibid.* In addition, Representative Jencks of Rhode Island offered a substitute bill which would have expatriated any citizen who became naturalized in a foreign State, who performed public duties under a foreign government, or who became domiciled abroad without an intent to return to the United States. *Id.* at 968, 1128–1129. The proposed excep-

[15] Although recent events in Prussia and Great Britain appeared to be the immediate cause of the Congressional action, Congress was well aware that the problem was not confined to those two countries. For example, Representative Chanler of New York observed on the floor of the House (Cong. Globe, *supra*, p. 1015):

"The evil which this bill is called on to redress seems almost universal in Europe. No American is safe if a public official chooses to show his zeal to his Government by arresting Americans to discourage emigration."

tions to the declaration that all citizens would be granted diplomatic protection were subjected to extensive criticism on the floor of the House. The critics contended that they weakened an otherwise strong protest against Great Britain and that, in any event, the exceptions were unnecessary because the Department of State never had protected, and never would protect, such persons. See, *e.g.*, *id.* at 965–970, 986–987, 1015–1016, 1106. As a result, the Committee on Foreign Affairs withdrew the bill, and later reported out a new bill which was substantially similar to the Act which Congress finally passed. *Id.* at 1160, 1797.

During the same year, 1868, the Department of State attempted a second approach to the problem. Mr. Bancroft, the American Minister to the North German Confederation, negotiated a treaty with that state which provided, first, that each country would recognize naturalization of its natives by the other country; second, that "[i]f a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization * * *"; and third, that "[t]he intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country." 15 Stat. 615, 616–617. Similar treaties, known as the "Bancroft treaties," were concluded with several other countries from then until well into the twentieth century. *E.g.*, 17 Stat. 941 (Denmark); 37 Stat. 1653 (Convention with several Latin American countries). Today 21 such treaties are still in force. However,

many countries, including a number of large and important ones, have refused to enter such treaties. See, *e.g.*, 3 Moore, *supra*, pp. 604–607 (Greece), 609 (Italy), 622 (Russia).

Late in the nineteenth century, in dealing with countries with which no naturalization treaty had been entered, the Department of State went beyond the mere denial of protection. It became the practice to inform naturalized citizens residing in their native lands without intent to return that they had expatriated themselves. *E.g.*, Letter from Acting Secretary of State Hill to Pioda (1901), *Foreign Rel. U.S.* 511 (1901); Letter from Assistant Secretary of State Rives to Proios (1888), 3 Moore, *supra*, pp. 741–742; Letter from Secretary of State Bayard to Lee (1886), *id.* at 740–741; Letter from Examiner of Claims Smith to Hance (1867), *id.* at 737; Letter from Secretary of State Seward to Marsh (1863), *id.* at 736; see also 7 *Messages & Papers of the Presidents* 240 (Richardson ed., 1897) (President Grant's annual message to Congress in 1873); 2 *Foreign Rel. U.S.* 1185–1223 (1873) (opinions of the cabinet officers). This doctrine—that domicile by a naturalized citizen in the country of his former nationality resulted in his expatriation—was followed on several occasions by international mixed claims commission set up to arbitrate the claims of American citizens against foreign governments. See 3 Moore, *History and Digest of International Arbitrations* 2562–2572, 2579–2581 (1898). However, the Department's practice was not uniform as to whether such persons were expatriated or were merely denied protection; it apparently de-

pended on the particular Secretary of State as well as the officer making the determination. See, *e.g.*, 2 *Foreign Rel. U.S.* 1186–1232 (1873).

While "[n]o one seems to have questioned the necessity of having the State Department, in its conduct of the foreign relations of the Nation, pass on the validity of claims to American citizenship and to such of its incidents as the right to diplomatic protection," *Perez* v. *Brownell*, 356 U.S. 44, 49, it was widely regarded as unsatisfactory that such determinations should depend upon scattered treaties and ungoverned executive discretion. See H. Doc. No. 326, 59th Cong., 2d Sess. 13, 26. There were proposals that Congress should enact a statute providing for expatriation of naturalized citizens who returned to their former homelands for a specified number of years. As early as 1863, President Lincoln, troubled by the "altercations and great prejudices" that had resulted from the return of naturalized citizens to their countries of origin during the Civil War, suggested to Congress that "[i]t might be advisable to fix a limit beyond which no citizen of the United States residing abroad may claim the interposition of the government." 6 *Messages & Papers of the Presidents* 181 (Richardson ed., 1897).

In 1873, President Grant requested his principal executive officers to respond in writing to eight questions on expatriation and the protection of American citizens abroad. 2 *Foreign Rel. U.S.* 1185–1186 (1873). The third question was, "Can an election of expatriation be shown or presumed by an acquisition of domicile in another country, with an avowed pur-

pose not to return?" The sixth question, directed to naturalized citizens, asked whether they could be deemed to have expatriated themselves by returning to their native countries and residing there for a series of years with no apparent purpose of returning. Secretary of State Hamilton Fish wrote in answer to the third question (*id.* at 1188–1189):

> He may reside abroad for purposes of health, of education, of amusement, of business, for an indefinite period; he may acquire a commercial or a civil domicile there; but if he do so sincerely and *bona fide animo revertendi,* and do nothing inconsistent with his preexisting allegiance, he will not thereby have taken any step towards self-expatriation.
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> But if, instead of this, he permanently withdraws himself and his property, and places both where neither can be made to contribute to the national necessities, acquires a political domicile in a foreign country, and avows his purpose not to return, he has placed himself in the position where his country has the right to presume that he has made his election of expatriation.
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> But in the absence of legislative definition of what constitutes "expatriation," and of the mode whereby it is to be effected, the experience of the Government has made manifest that while expatriation is declared to be a right, which may be converted into a fact, it is, like other facts, to be established in each individual case by evidence peculiar to itself; and each case to be decided upon its own merits.

Mr. Fish applied the same standards to naturalized citizens residing abroad as he had applied to native-

born citizens, but he made an exception for naturalized citizens residing in their native countries because (*id.* at 1190–1191):

> [T]here is an appreciation of the strong proclivity to resume his original citizenship on the part of him who, having wandered from home, returns to find the attractions of early associations and of family ties enticing him at a period, perhaps, when the restlessness and spirit of adventure of the fresher years of life have passed, to rest and to end his days amid the scenes of his childhood or youth and among those who claim the strong ties of common blood.
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> Hence, probably, even when not regulated by treaty, the evidence would be more readily obtained to determine that a naturalized citizen who had returned to the country of his nativity should be deemed to have expatriated himself—or, perhaps it would be more proper to say, to have rehabilitated himself with his original citizenship—than to show that a native-born citizen had expatriated himself by the same period of foreign residence.

The other executive officers expressed differing opinions: three answered that neither naturalized nor native-born citizens should be expatriated in such circumstances; two would have expatriated both classes of citizens; and the remaining officer thought naturalized, but not native-born, citizens should be deemed to have expatriated themselves. *Id.* at 1193–1223.

The answers were submitted by President Grant with his annual message to Congress of 1873 in which

he requested that legislation be enacted to guide the executive department in these matters. 7 *Messages & Papers, supra*, pp. 239–240. In his annual message of 1874, President Grant said (*id.* at 291–292).

> Notwithstanding such assertion and the necessity of frequent application of the principle, no legislation has been had defining what acts or formalities shall work expatriation or when a citizen shall be deemed to have renounced or to have lost his citizenship. The importance of such definition is obvious. The representatives of the United States in foreign countries are continually called upon to lend their aid and the protection of the United States to persons concerning the good faith or the reality of whose citizenship there is at least a great question. In some cases the provisions of the treaties furnish some guide; in others it seems left to the person claiming the benefits of citizenship, while living in a foreign country, contributing in no manner to the performance of the duties of a citizen of the United States, and without intention at any time to return and undertake those duties, to use the claims of citizenship of the United States simply as a shield from the performance of the obligations of a citizen elsewhere.

Congress did not respond, and no legislation was enacted in the nineteenth century.

3. Expatriation Legislation in the Twentieth Century

Congress took a small step in the direction of solving the problem of naturalized citizens returning to their former homeland in the Naturalization Act of

1906, 34 Stat. 596, 601. That statute provided that the naturalization of a person who establishes permanent residence in a foreign country within five years of his naturalization shall be presumed fraudulent and subject to revocation.[17] While the 1906 act was under consideration, Congress called for a thorough examination of American citizenship, expatriation, and diplomatic protection. See *Perez* v. *Brownell*, *supra*, 356 U.S. at 49–50. Accordingly, Secretary of State Elihu Root appointed several high officials to a "citizenship board" to consider and report on these matters.[18] See H. Doc. No. 326, *supra*, pp. 1–2.

An extensive report was submitted by the board in 1906. H. Doc. No. 326, *supra*. It stated (*id.* at 25):

> Expressed renunciation of American citizenship is, however, extremely rare; but the class of Americans who separate themselves from the United States and live within the jurisdiction of foreign countries is becoming larger each year, and the question of their protection causes increasing embarrassment to this Government in its relations with foreign powers.

The board concluded that the problem could not be solved by merely denying diplomatic protection, for a denial of protection is, at best, of a transitory character which results in the unseemly spectacle of "one

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[17] This provision is now contained in Section 340(d) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. 1451(d). Its constitutionality was sustained in *Luria* v. *United States*, 231 U.S. 9.

[18] The board consisted of the Solicitor of the State Department, the Minister to the Netherlands, and the Chief of the Passport Bureau.

official [granting] what another has refused." Moreover, a mere denial of protection leaves too much uncertainty with respect to the status of a citizen. *Id.* at 26. The board recommended, *inter alia*, that legislation be enacted to provide that citizens "may be assumed" to have expatriated themselves (1) by being naturalized in a foreign state, (2) by entering the service of a foreign government when such service required taking an oath of allegiance, or (3) by becoming domiciled in a foreign state. *Id.* at 23. In connection with the last item, the board proposed a rebuttable presumption that domicile had been acquired upon five years' residence without an intention to return to the United States."

The board's recommendations led to the enactment of the Nationality Act of 1907, 34 Stat. 1228. Section 2 of that Act expatriated citizens who became naturalized in, or took an oath of allegiance to, a foreign state. It further provided (*ibid.*):

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the

[11] The board also recommended that efforts be renewed to negotiate naturalization treaties. H. Doc. No. 326, *supra*, pp. 13–14 (see pp. 27–28 above).

> Department of State may prescribe: *And provided also;* That no American citizen shall be allowed to expatriate himself when this country is at war.

In explaining the purpose of the latter provision, the House committee stated (H. Rep. No. 6431, 59th Cong., 2d Sess. 2):

> Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. * * * Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world, without any intention of returning to this country. * * *
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> * * * [S]uch a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.

The State Department issued detailed instructions which provided that the presumption of loss of citizenship might be rebutted by the presentation of satisfactory evidence that the individual intended eventually to return to the United States to reside permanently and that his residence abroad (1) was as a representative of American trade or commerce, (2) was for reasons of health or education, or (3) resulted from unforeseen exigencies preventing his return. Instructions of April 19, 1907, 1 *Foreign Rel. U.S.* 4 (1907). The instructions were later broadened to cover other circumstances (see *Nationality*

Laws of the United States, Part 1, House Committee Print, 76th Cong., 1st Sess. 69–70 (1939)), and formed the basis of the many exceptions to the provision involved in the instant case (see pp. 3–5 above)."

The presumption written into the 1907 Act proved troublesome in practice. Attorney General Sargent described it in 1928 as "so loosely drawn that its operation and effect have been in doubt since its passage," and urged the need for "clarifying legislation." 35 Op. Att'y Gen. 399, 404.[20] In 1933, President Roosevelt appointed a committee consisting of the Secretary of State, the Attorney General, and the Secretary of Labor to review the nationality laws. After five years of intensive study by experts,[21] the committee concluded that (*Nationality Laws, supra*, p. 70), while the presumption:

> has been of much practical use * * *, it has been found to a considerable extent to be insufficient and unsatisfactory, since, as con-

[20] Appellant asserts (Br. 30, 53) that the 1907 Act applied the presumption only to loss of diplomatic protection, not to loss of citizenship itself. While the wording of the statute is in terms of loss of citizenship and not merely protection, an Attorney General's opinion and several judicial decisions support appellant's statement. 28 Op. Att'y Gen. 504; *e.g.*, *Camardo* v. *Tillinghast*, 29 F. 2d 527 (C.A. 1). *Contra*, *United States ex rel. Anderson* v. *Howe*, 231 Fed. 546 (S.D. N.Y.).

[21] The Attorney General cited this Court's opinion in *Talbot* v. *Jansen*, 3 Dall. 133, 154, which stated that a statute "relative to expatriation, is much wanted" and besides "ascertaining by positive law the manner in which expatriation may be effected, would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point."

[22] The experts included among others, Charles E. Wyzanski, Green H. Hackworth, and Richard W. Flournoy.

> strued by the courts, the presumption of loss of citizenship arising under its terms never becomes final, regardless of the length and cause of the foreign residence.

Moreover, the committee observed, the courts had construed the presumption as relating "to loss of the right to diplomatic protection as a citizen, rather than loss of citizenship itself," thus frustrating the purposes of the 1907 legislation. The cabinet committee went on to state that (*ibid.*):

> [B]efore an alien is admitted to the privilege of citizenship, under the law of the United States, he is required to declare under oath that he intends to reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted.
>
> The problem presented by naturalized citizens of the United States residing, for insufficient reasons, in the foreign states in which they were born or of which they were formerly nationals, of whom there are thousands at the present day, has been a cause of difficulty and embarrassment to the Government of the United States in its efforts to extend protection to other naturalized citizens in meritorious cases.

It was also pointed out that (*id.* at 71):

> Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes

> it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated. Naturally, in these cases, identification with the native population is much more likely to occur than in the cases of naturalized citizens who reside in foreign countries other than those from which they came.

Accordingly, the cabinet committee recommended the enactment of a provision that a naturalized citizen (unless he came within specified exceptions) should lose his citizenship by "[r]esiding continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated." *Nationality Laws, supra,* pp. 69, 76.[23] In its letter transmitting its report to the President, the committee stated (*Nationality Laws, supra,* p. vii):

> Important reasons for terminating American nationality in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States lie in the fact that it will prevent them from transmitting American nationality to their foreign-born children having little or no connection

[23] The committee also recommended an additional provision for the expatriation of a naturalized citizen who resides for two years in his country of origin if he thereby requires its nationality by operation of law. *Nationality Laws, supra,* p. 69.

The committee expressed the hope that enactment of the three-year provision might induce more countries to enter into naturalization treaties with the United States. *Id.* at 71.

> with the United States, and embroiling this Government in controversies which they may have with the governments of the foreign countries in which they reside.

In explaining why expatriation rather than denial of protection was recommended, the committee said, "In general the right to protection should be coexistent with citizenship, and a law under which persons residing abroad are denied the protection of this Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable." *Ibid.* The committee also stated (*ibid.*):

> None of the various provisions in the [draft] Code concerning loss of American nationality, such as those applicable to * * * persons who, after obtaining American nationality through naturalization, establish a residence abroad, is designed to be punitive or interfere with freedom of action.

The President transmitted the report and draft statute to Congress in June 1938."

Extensive hearings were held on the proposed statute by the House Committee on Immigration and Naturalization. Mr. Flournoy, Assistant Legal Advisor of the State Department, testified that the provision for expatriation of naturalized citizens who reside for three years in their native countries "is the most important proposed change in the whole code." *Hearings before the House Committee on Im-*

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[24] At the time of the report the committee was composed of Secretary of State Hull, Attorney General Cummings, and Secretary of Labor Perkins.

migration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. 134. He said that (*id.* at 134):

> We have every day in the State Department cases of persons applying to us for passports or protection, or asking us to support claims, who had been naturalized in the United States and then have gone back and settled down in their native countries and resided there for years. We think there should be some point at which such person should lose not only his right to protection but his citizenship itself.

He explained why mere denial of protection was an insufficient remedy (*id.* at 134–135):

> We consider it very undesirable that we should have persons who are not entitled to the protection of our Government and yet remain as citizens of the United States. It makes it difficult for us to extend the effect of protection to those who are really citizens and have maintained connections with the United States, to have these people retaining their citizenship.

The Nationality Act of 1940, as passed by Congress, incorporated the provision for expatriating naturalized citizens who reside in their countries of origin for three years, exactly as it had been proposed by the cabinet committee. Section 404(b), 54 Stat. 1170. In addition, Congress added a provision that a naturalized citizen "[r]esiding continuously for five years

in any other foreign state" should lose his citizenship. Section 404(c), 54 Stat. 1170.[25]

A Congressional investigation of the immigration and nationality laws instituted some seven years later in 1947 concluded that the "continuous residence" requirement in Section 404(b) and (c) allowed evasion since persons subject to those provisions "break the continuity of their foreign residence by short trips to another foreign country, or by a short visit to the United States." S. Rep. No. 1515, 81st Cong., 2d Sess. 767. The investigating subcommittee also recommended that several additional groups of individuals be added to those excepted from the operations of Section 404. *Id.* at 767–768.[26] These recommendations were adopted in the Immigration and Nationality Act of 1952, which carried over the three-year provision unchanged as Section 352(a)(1) and the five-year provision as Section 352(a)(2). 66 Stat. 269,

[25] These provisions in fact did not go into effect until 1946 because they were suspended during World War II. 59 Stat. 544.

Congress also adopted in the 1940 Act a provision for the expatriation of naturalized citizens who resided for two years in their country of origin if they thereby became citizens of that country. Section 404(a), 54 Stat. 1170.

[26] The committee further recommended the repeal of the provision in Section 404(a) for the expatriation of a naturalized citizen who resided in their country of origin for two years if they thereby became citizens of that country. S. Rep. No. 1515, *supra*, p. 767. This recommendation was followed by Congress.

8 U.S.C. 1484(a)(1), (a)(2). Congress adopted a specific definition of "continuous residence" to mean "actual dwelling place" without requiring an "uninterrupted physical presence in a foreign state" (Section 101(a)(33), 66 Stat. 166, 8 U.S.C. 1101(a)(33); see p. 2 above) and enlarged the groups excepted from the operation of Section 352 (Section 353, 66 Stat. 270). The exemptions in Section 353 have been slightly amended since that time. 73 Stat. 274, 8 U.S.C. 1485(7); see pp. 3–5 above.

Although the 1952 Act was extensively analyzed and often criticized by persons of all political persuasions during lengthy Congressional hearings in 1951, we have found not a word of criticism against proposed Section 352(a)(1). See *Joint Hearings Before the Subcommittees of the Committees of the Judiciary on S. 716, H.R. 2379, and H.R. 2816*, 82d Cong., 1st Sess. (1951). Among those who offered detailed criticisms of the proposed legislation were representatives of the Association of Immigration and Nationality Lawyers, the National Council on Naturalization and Citizenship, and the American Jewish Congress, who found Section 352(a)(2) discriminatory and unreasonable but made no objection to 352(a)(1). *Id.* at 86, 105, 386–389, 393–394, 683.[17] The American Civil Liberties Union found the bill deficient in many respects but made no mention of 352(a). *Id.* at 126. And Americans for Democratic

[17] The recommendations of the National Council on Naturalization and Citizenship were adopted by the National Catholic Rural Life Conference and the National Council of Jewish Women. *Joint Hearings*, *supra*, pp. 237, 542.

Action contrasted the injustice of expatriating a naturalized citizen for residing in any foreign country (Section 352(a)(2)) with the expatriation of those who return to reside in their native countries. *Id.* at 442.[28]

4. The Problem Today

Since, by virtue of the 1940 Act and its successors, naturalized citizens residing abroad for considerable periods of time have been deemed expatriated, it is difficult to measure the extent of the international difficulties which would be created if a different approach were to prevail. However, incidents involving American naturalized citizens returning for visits do suggest that residence of United States nationals abroad continues to be a source of international friction which might well be greatly aggravated if the group were expanded to include those now deemed expatriated. The number of naturalized citizens residing in their native countries is substantial. In 1962 the Department of State found that 699 persons were expatriated under Section 352(a)(1), 128 persons under Sections 404 (a) and (b) of the Nationality Act of 1940, and 94 persons under Bancroft treaties—a total of 919 expatriations on the basis of residence in countries of former nationality in just one year. Thus, thousands of former naturalized American citizens are

[28] Mrs. Ruth B. Shipley, Chief of the Passport Division of the State Department, objected to Section 352(a)(2) but suggested approval of Section 352(a)(1). *Joint Hearings, supra*, pp. 247–248. Another witness, B. Meredith Langstaff also criticized Section 352(a)(2) but approved Section 352(a)(1). *Id.* at 598.

living abroad who have been expatriated under the same or similar provisions as those involved here. An estimated 5,000 claimants to American citizenship reside in "iron curtain" countries alone; most of them have been deemed expatriated by reason of voluntary foreign residence. *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. Res. 49,* 85th Cong., 1st Sess. 133.

A recent example of the problems arising when naturalized citizens reside for a considerable period of time in the country of their origin is provided by Polish-American relations. In 1947, claims to United States citizenship by persons residing in Poland had caused such concern that the two countries set up a mixed nationality commission to investigate the matter. U.S. Department of State Press Release No. 413, May 25, 1948. It was contemplated that the establishment of such a commission would induce Poland to grant requests by *bona fide* citizens to leave for the United States and to permit American representatives to visit claimants who had been arrested. The commission proved a failure, and Poland continued to forbid American citizens to depart and to bar visits to claimants in prison. This item of history shows that the problems in international relations arising from residence of United States nationals abroad, particularly those residing in a country which has some claim upon them under its own laws, cannot be adequately dealt with by the easy suggestion that such people should merely be denied protection. For one thing, the United States

must allow any citizen to enter this country. It would seem to be almost inevitable that, if those long resident in a foreign country which has a claim upon them seek to exercise their right to enter the United States, friction between the countries will ensue.

The State Department advises us that protection of naturalized citizens is today a sensitive matter in a number of countries—particularly Belgium, Greece, France, Iran, Israel, Switzerland, and Turkey—which refuse to recognize the expatriation of their nationals who acquire American citizenship. Greece, for instance, has since 1952 drafted her former nationals who return to visit. In 1963, during the middle of tourist season, the Greek government stopped several hundred naturalized American citizens of Greek origin at the border when they attempted to leave and charged them with draft evasion. Some were arrested as draft evaders, but the normal course was to make them pay a military tax which was assessed on the basis of personal income and which generally amounted to several hundred dollars. As a result of American intervention, Greek law was applied only to persons who left Greece after the age of eleven and who had not served in the United States Army. Later, exemptions were obtained for those who were "well established" in the United States. In September 1963, the law was abolished. See New York Times: Aug. 11, 1963, p. 13; Aug. 13, 1963, p. 2; Aug. 18, 1963, p. 6; Aug. 25, 1963, p. 10; Sept. 7, 1963, p. 4; Sept. 18, 1963, p. 5.

Several naturalized Americans who visited the World's Fair at Brussels were drafted into the Bel-

gian army. Switzerland has been imposing a military tax on her returning nationals. Typically, United States representations have been successful in instances when the naturalized citizen was merely visiting his former country; generally it has been unsuccessful in cases where the citizen remained for a substantial period and took up residence abroad.

Another indication of the Department of State's present concern over these problems is that Bancroft treaties (see pp. 27–28 above) with 21 countries are now in force and being applied.[29] Furthermore, the Department of State is currently drafting additional nationality treaties which it plans to offer to other countries in the near future. The United States also has treaties with several countries, including eleven countries with which we do not have Bancroft treaties, which deal with the military obligations of persons whose allegiance is claimed by more than one country.[30]

5. Similar Provisions In Other Countries

The history of expatriation because of prolonged residence abroad is essentially the same in other western countries. For example, during the nineteenth

[29] Albania, Argentina, Belgium, Bulgaria, Chile, Colombia, Costa Rica, Czechoslovakia, Denmark, Ecuador, El Salvador, Haiti, Honduras, Lithuania, Nicaragua, Norway, Panama, Peru, Portugal, Sweden, and Uruguay.

[30] Australia, Austria, Belgium, Brazil, Burma, Colombia, Chile, El Salvador, France, India, Indonesia, Netherlands, South Africa, Switzerland, and the United Kingdom. For the provisions of such treaties, see, *e.g.*, 50 Stat. 1317. The treaty with France was extended as recently as 1952. 3 *U.S. Treaties and Other International Agreements* 5345 (1952).

century, foreign residence or emigration was a basis for expatriation under the laws of France, Prussia, Austria, Bavaria, and Sardinia. See 2 *Foreign Rel. U.S.* 1276–1293 (1873). Under the laws of Great Britain, one finds that between 1850 and 1870 naturalized citizens who resided abroad for six months lost their citizenship, and between 1914 and 1948 naturalized citizens were expatriated if they resided abroad for seven years without maintaining a "substantial connection." Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland* 70, 171–172 (1957); Cockburn, *Nationality* 33–34 (1869).

Today, many other countries make residence abroad cause for expatriation under their nationality laws and generally these provisions apply, as in the United States, only to naturalized citizens. U.N. Secretariat, Legal Department, *Laws Concerning Nationality* (1954); *id.* (Supp. 1959). These compilations show that: (1) Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, New Zealand, Paraguay, Thailand, and Venezuela expatriate naturalized citizens who reside abroad for periods ranging from two to ten years; (2) Canada, Ceylon, Costa Rica, Israel, Nicaragua, and Pakistan expatriate naturalized citizens who reside abroad for periods from two to seven years if no substantial connection with their adopted country is maintained; (3) Liberia presumes expatriation from two years' residence in the country of former nationality; (4) Czechoslovakia and Poland expatriate any citizen who fails to obey an order to return home; (5) Australia, Cuba, Ghana, India, Malaysia, Netherlands, South Africa, Southern Rhodesia, Sudan, and

the United Kingdom expatriate naturalized citizens who have resided abroad for periods varying from three to seven years if they fail to file an annual declaration of intent to retain citizenship; (6) Afghanistan expatriates citizens residing abroad who display a lack of patriotic feelings and who intentionally avoid that country's consulates and legations; and (7) Yugoslavia expatriates any citizen who resides abroad for fifteen years, who does not perform civic duties, and who fails to report to specified government agencies.[21]

Only four of the thirty countries—Czechoslovakia, Poland, Afghanistan, and Yugoslavia—apply the provisions governing expatriation by reason of foreign residence to both native-born and naturalized citizens. The Pakistani law applies only to naturalized citizens; however, a different provision expatriates native-born citizens who reside abroad for seven years and who fail to file a declaration of intent to retain citizenship. The United Kingdom and seven Commonwealth countries apply their expatriation provisions to naturalized and registered citizens but not to native-born citizens. Citizenship by registration is an expedited form of naturalization available to near relatives of citizens and to nationals of other Commonwealth countries.

[21] New Zealand, Ghana, India, Malaysia, and the United Kingdom make an exception when continued citizenship is "conducive to the "public good" or "public welfare."

The *amicus curiae* brief of the American Civil Liberties Union, pp. 29–30, has different views as to the law of some of the countries discussed above. Based on the compilation prepared by the United Nations, we believe that the *amicus* brief is in error in this regard.

The reason for these distinctions between native-born and naturalized citizens was recently set forth by the delegate of the United Kingdom to an international Conference on the Elimination or Reduction of Future Statelessness:[22]

> The natural-born person had a birth right to his nationality: but the naturalized person was expected to justify his acquisition of nationality by a higher standard of behaviour and States should have greater freedom to deprive him of his nationality.

On the basis of its consideration, the Conference adopted article 7 of the United Nations Convention on the Reduction of Statelessness, which provides that naturalized citizens who reside abroad for seven years shall be expatriated unless they make declarations of an intent to retain citizenship. See Weis, *The United Nations Convention on the Reduction of Statelessness, 1961,* 11 International and Comparative L.J. 1073, 1092 (1962); see, generally, *id.* at 1073–1096. Thus, the expatriation of naturalized citizens who adopt prolonged residence abroad has long been, and still is, the general practice of nations throughout the world.

* * * * * * *

In short, the whole history of this country—and of others as well—shows that the long-time residence of citizens abroad raises problems in international relations. Those problems are more acute when a natu-

[22] Summary Record of the 15th Meeting of the Committee of the Whole, U.N. Conference on the Elimination or Reduction of Future Statelessness, p. 10 (1961).

ralized citizen resides abroad, and especially so where he resides in the country of his former nationality—a country which has a considerable claim upon him. History shows that this is factually, not merely theoretically, a source of difficulty in international relations. The question thus narrows: Did Congress, in view of these historical facts, act reasonably when it enacted the measures here involved?

B. THE PROVISION FOR EXPATRIATION AFTER THREE YEARS' RESIDENCE IN THE NATURALIZED CITIZEN'S FORMER HOMELAND IS A REASONABLE REMEDY FOR THE INTERNATIONAL COMPLICATIONS REVEALED BY EXPERIENCE

Section 352(a)(1) provides for the expatriation of naturalized American citizens who return to their former homeland and continuously reside there for more than three years.[22] The principal questions are whether Congress has the power to expatriate American citizens because of long residence abroad and, if so, whether it can decide to provide for the expatriation of naturalized citizens who reside in their former homeland but not make comparable provision for native-born citizens who live abroad. These two issues are so interrelated that they cannot properly be treated separately. What Congress has found, in substance, is that long residence abroad by naturalized American citizens in their former homelands creates problems which are far more serious than those presented by residence abroad of native-born citizens, and that these problems, in their more aggravated

[22] In a separate provision not involved in this case, Section 352(a)(2), Congress dealt with the related problem of naturalized citizens residing in countries other than of their origin.

form, can only be dealt with effectively by loss of nationality. We submit that Congress' decision to limit the application of Section 352(a)(1) was both reasonable and constitutionally permissible.

1. Section 352(a)(1) is an Exercise of Congress' Powers in the Field of Foreign Relations

In each of the cases in which this Court has sustained an expatriation statute, it has concluded that Congress was acting under its well-settled power to regulate the relations of this country with other nations. *Mackenzie* v. *Hare*, 239 U.S. 299, 311–312; *Savorgnan* v. *United States*, 338 U.S. 491, 500; *Perez* v. *Brownell*, 356 U.S. 44, 57–60; see *Lapides* v. *Clark*, *supra*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860.

It is abundantly clear from the foregoing recitation of the diplomatic and legislative background of Section 352(a)(1) (pp. 15–50 above) that the problem with which it deals has been a persistent one in the foreign relations of the United States and that Congress, in enacting it, "was seeking to effectuate its power to regulate foreign affairs." *Perez* v. *Brownell*, 356 U.S. 44, 57. Indeed, it is fair to say that no other expatriation provision—including the one sustained in *Perez*—is supported by such extensive evidence of serious diplomatic problems and sincere governmental efforts to resolve them. Since the power of Congress to employ the remedy of expatriation where reasonably necessary to solve foreign affairs problems is well settled, the question remains whether "the means—in this case, withdrawal of citizenship—[is] reasonably related to the end—here, regulation

of foreign affairs." *Perez* v. *Brownell, supra,* 356 U.S. at 58.

2. A "Rational Nexus" Exists Between Expatriation and the Problems Congress Sought to Remedy

The "rational nexus" between the problems stemming from foreign residence of naturalized citizens in the countries of their origin and expatriation is readily apparent from the background of Section 352(a)(1). Experience has repeatedly shown that the residence of naturalized citizens in the country of their former nationality presents problems of a quite different order from those presented when a native-born American takes up residence abroad. If the naturalized American is a former national of the foreign country in question, that country, almost invariably, will give weight, in one way or another, to the factor of prior nationality. It may refuse to recognize the initial change of allegiance; it may take the view that the resumption of residence in the native land effects a full repatriation; it may merely insist that the returning national perform various obligations and services. The longer the naturalized citizens remain, the greater the probability not only that they will become involved in difficulties, but also that their native countries will rebuff American efforts to intervene. When the relations between the United States and the native land are strained, as has been true in our relations with "iron curtain" countries, the frictions and embarrassments have been aggravated. Surely, so long as nationality prior to naturalization is a factor which is generally regarded by the countries of the

world as one of significance, it cannot be said that it is irrational for Congress to regard the return of naturalized citizens to the countries of their former nationality as a problem in the conduct of foreign affairs.

In these situations, as in *Perez* v. *Brownell,* "it is the possession of American citizenship by a person committing the act [here, protracted residence in the country of his origin] that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations." 356 U.S. at 60. If the person who has chosen to reside in his native country is no longer an American citizen, there will be no demands for assistance by the United States, no potentiality for creating conflict with the native country or for embarrassing this country in the conduct of its foreign relations. In short, "[t]he termination of citizenship terminates the problem." *Ibid.* Accord, *Trop* v. *Dulles,* 356 U.S. 86, 106 (Mr. Justice Brennan concurring).

Since Section 352(a)(1) is a rational and appropriate means of dealing with serious problems confronting Congress, there is no occasion to examine "alternative methods of achieving the purposes of its legislation" (see App. Br. 43). It is well settled that, in reviewing a Congressional enactment, this Court does not "inquire into the degree of its necessity" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 423), because "all means which are appropriate, which are plainly adapted to [the] end, which are not prohibited, but consist with the letter and spirit of the con-

stitution, are constitutional" (*id.* at 421). Congress has discretion to select among several means, all of which are appropriate, whichever it deems desirable; choosing among such rational alternatives requires a political, rather than a legal, judgment. And it is particularly important that Congress be afforded ample latitude and flexibility in making this choice when legislating in the complex and sensitive area of foreign affairs. As this Court said in discussing the same kind of problem in *Perez* v. *Brownell, supra,* 356 U.S. at 60:

> The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose.

Moreover, nothing emerges more clearly from the diplomatic and legislative background of Section 352(a)(1) than that Congress felt that every other reasonable mode of dealing with the problem at hand had been exhausted and that expatriation was the best alternative available. A solution by means of naturalization treaties had been attempted, but many countries had proved unwilling to enter into such agreements (see pp. 27–28 above). A statutory presumption of expatriation had been attempted, but this had proved almost impossible to administer (see pp. 36–37 above). The denial of diplomatic protection or other relief had been repeatedly attempted; however, both the 1906 State Department board and the 1938 cabinet committee pronounced it unsatisfactory (see pp. 33–34, 37–39 above). It was not until all of these

remedies had been tried and found wanting that Congress resorted to outright expatriation.

The Department of State, in conjunction with Congress, has formulated a broad policy to apply to the protection of American citizens aboard. An integral part of American foreign policy is the government's commitment to protect all citizens, both native-born and naturalized. This policy implements an 1868 statute (see p. 24, note 15) which commands the President to protect all citizens from imprisonment by a foreign government by using "such means, not amounting to acts of war, as he may deem necessary and proper * * *." Rev. Stat. §§ 2000–2001 (1875).[34] One application of the policy results in restricting travel to countries where protection is impossible. Another application is Section 352(a)(1) which expatriates citizens whose protection is apt to cause serious friction and embarrassment. This general policy has three important advantages: (1) it guarantees every citizen that this country will take steps to protect him; (2) when appropriately implemented, it tends to deter other countries from lightly interfering with the rights of American citizens;[35] and (3) it avoids the friction

[34] Due to an oversight which has no legal effect, the statute was omitted from the 1958 edition of the United States Code. Section 2000 of the Revised Statutes requires that the President give the same protection to naturalized and native-born citizens overseas.

[35] As the report of the cabinet committee underlying the 1940 Act stated, "[A] definite provision for the termination of American nationality * * * will have the effect of persuading foreign states * * * to recognize the American nationality [of naturalized citizens] when they return to their countries of origin for legitimate objects and for residence of a temporary character." *Nationality Laws*, *supra*, p. 71.

and embarrassment which inevitably arise when protection is impossible or wholly inadequate.

On the other hand, it would be embarrassing to this country, *vis-à-vis* other nations, if the right of American citizens to diplomatic protection were less than the full measure. As the Citizenship Board studying these problems observed in 1906 (see pp. 33–34 above), denial of protection to the citizen is an inadequate solution. And, as Assistant Legal Adviser Flournoy emphasized in the hearings prior to the 1940 Act (see p. 40 above), failure of this country to give protection to citizens in some instances makes it more difficult to enforce it in others.

Moreover, denial of protection does not necessarily solve the basic problem caused by residence of naturalized citizens in the countries of their former nationality. At a minimum, recognition of United States nationality must include the right to return to the United States. As has been seen (pp. 21–46), the existence of this right can cause international complications when a foreign government treats a naturalized American citizen for a long period of time as one of its own citizens and therefore refuses to allow him to leave the country.

Not all international crises have occurred because two nations deliberately chose to follow paths which caused them to collide; some crises have been the product of accident rather than deliberation, as when an unanticipated event cast two nations on opposite sides of a controversy, and neither could uncover a means of withdrawing with honor. The vagaries of international politics often create situations in which

decisions are impelled rather than selected rationally. Expatriation of naturalized citizens residing in their countries of origin avoids such situations, for it constitutes a clear and total renunciation of all interest in their future actions. It invokes the established principle of international law that, once a citizen has been expatriated, the expatriating sovereign cannot claim the right to protect him. See Jessup, *A Modern Law of Nations* 99 (1948). In contrast, a denial of protection does not constitute a total renunciation of interests, as it leaves intact the person's citizenship. As long as that connection remains, this country has the right to intervene on his behalf, and there will always remain the possibility of pressures, both foreign and domestic, to make some efforts on his behalf. It is entirely reasonable for Congress to establish a complete separation between persons whom this country will vigorously defend and those in whom it renounces all interest. Such a clear definition of American responsibility is plainly adapted to avoiding international tensions created by misunderstanding.

C. THE TENDENCY OF THREE YEARS' RESIDENCE BY A NATURALIZED CITIZEN IN HIS COUNTRY OF ORIGIN TO WEAKEN HIS ALLEGIANCE TO THE UNITED STATES IS FURTHER EVIDENCE THAT SECTION 352(a)(1) IS A REASONABLE REGULATION OF CITIZENSHIP

The United States, as a sovereign nation, has the undoubted power to regulate its own national citizenship as an inherent right of sovereignty. Besides its inherent power over citizenship, Congress also has power explicitly conferred by Article I, Sec. 8, cl. 4, "[t]o establish a uniform Rule of Naturalization."

Cf. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668; *Mackenzie* v. *Hare*, 239 U.S. 299, 311. As this Court recognized in *Luria* v. *United States*, 231 U.S. 9, 22, there is an inescapable relationship between citizenship and the citizen's allegiance to his country:

> Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.

It follows, we submit, from these premises, that it is within the power of Congress to terminate a person's American citizenship where his conduct manifests a withdrawal or transfer of his allegiance to the United States.

This view seems to have been adopted in *Perez* v. *Brownell*, 356 U.S. 44, 60–61, where this Court observed that Congress had interpreted the conduct involved there (voting in a foreign election):

> as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

We do not read that statement, as does appellant (Br. 60–61), to mean that only acts from which a withdrawal or transfer of allegiance can be inferred may be the subject of expatriation legislation. As we read the Court's opinion, this fact was cited as an additional source of Congressional power—the power to regulate citizenship (and with it, the authority to

deal with serious compromises of allegiance). Certainly, if the act of voting, which this Court relied on in the *Perez* case, shows a transfer of allegiance, prolonged residence in one's former homeland is even more convincing. Voting can be accomplished in a moment and can be without personal significance, especially if done without awareness of the legal consequences. Residence for a number of years, particularly in a country of former nationality, almost inevitably involves a fundamental transfer of interest and often of allegiance.

As we noted above (pp. 15–18), the Constitution embodies the concept, inherited from England, that citizenship is a gift which may be bestowed with conditions subsequent, as well as precedent. That concept is reflected in the language of the Constitution itself which gives naturalized citizens less right to hold political office than native-born citizens. Moreover, as the records of the Convention and the First Congress show, the framers intended Congress to have such power independent of the language in the text of the Constitution (see pp. 16–18 above). To be sure, that concept has been limited. On most issues the views expressed, as *dictum*, by Chief Justice Marshall in *Osborn* v. *United States Bank*, 9 Wheat. 738, 827–828—that the naturalized citizen stands on the same footing as the native born—are no doubt controlling. But this has never been taken to mean that Congress may not take steps to assure itself that the naturalized citizen will not revert to his former allegiance. Congress and this Court have repeatedly recognized that, in this context, residence is a matter of direct rele-

vance. See, *e.g.*, 34 Stat. 597; 66 Stat. 259, 8 U.S.C. 1449; *Luria* v. *United States*, 231 U.S. 9.

The reasoning of the *Luria* and *Perez* cases is supported both by sociological evidence and by international law. Whatever variations there may be in individual cases, most aliens returning to the country of their former nationality present problems of "acculturation," to use the anthropologist's term. The values and attitudes of men are shaped by the cultures in which they live. Linton, *The Cultural Background of Personality* 27–29 (1945). When a person moves from one culture to another, his values and attitudes will tend to change in the directions shaped by the new culture. However, the values acquired in early years, especially those transmitted through one's parents, tend to be more permanent and more resistant to change than values acquired later in life. *Id.* at 141–144. Sociological studies of immigrants living in the United States reveal that it often takes many years to overcome the conflict between the old and the new. See Glazer & Moynihan, *Beyond the Melting Pot* (1963); Lee, *The Chinese in the United States of America* (1960); Pisani, *The Italian in America* (1957); *American Minorities* (Barron ed., 1957); see also DeVries, *Man in Rapid Social Change* (1961).

Viewed in this light, the usual effect of a naturalized citizen's return to the country of his former nationality is not only to suspend the evolutionary process toward involvement in American society, but to strengthen the old ties at the expense of the new ones. Since the ties formed in childhood are stronger than

these acquired later in life, this regression will occur at a rapid pace and can, in a relatively short time, erase all substantial ties to this country. As Professor Bar-Yaacov has recently written: "nationals living abroad tend to dissociate themselves from the national life of their State and are likely to lose the characteristics normally expected of a national." *Dual Nationality* 261 (1961). And a leading authority on the foreign affairs of the United States has likewise stated that (Borchard, *The Diplomatic Protection of Citizens Abroad* 701 (1915)):

> The tie which binds the naturalized citizen to his adopted country has always been recognized as more easily dissoluble than that which binds the native citizen to his country.

When the naturalized citizen resumes permanent residence in the country of his origin, the pressures and temptations to revert to his old allegiance will be strong indeed. He will often be surrounded by his family and old friends whose only tie is with the native land.[28] Frequently he will marry a native, and his children will be born and raised there, with no real connection to his adopted country. He will generally resume old habits of living, including the language and customs of the native land. He will normally

[28] Secretary of State Fish observed in 1873 (Fish to Grant, Aug. 25, 1873, 2 *For. Rel. U.S.* 1190(1873)): "While the principle on which rests the right of protection while in foreign countries of the naturalized is the same with that of the native-born citizen, there is an appreciation of the strong proclivity to resume his original citizenship on the part of him who, having wandered from home, returns to find the attractions of early associations and of family ties enticing him * * *."

be dependent for his livelihood on the economy of the country in which he resides.

The importance of residence was recognised by the International Court of Justice in the *Nottebohm* case (second phase) (*Liechtenstein* v. *Guatemala*), I.C.J. Rep. 4 (1955), which involved a German national who had lived in Guatemala for thirty-five years without becoming naturalised; had transferred his citizenship from Germany to Liechtenstein at the outbreak of the Second World War; and, after spending only four days in the latter country, had returned to Guatemala. The court held that, under principles of international law, Liechtenstein had no standing to assert claims against Guatemala on behalf of Nottebohm, for, as between the two countries, he was a citizen of Guatemala. The court reasoned (*id.* at 23):

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence on reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.

International tribunals, the court said, do not view nationality merely as a legal status conferred by a particular country (*id.* at 22):

> They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.

Professor Bar-Yaacov has similarly stated (*Dual Nationality* 259–260):

> In other cases [nationality] legislation has attempted to ensure that nationality will be possessed by persons whose manner of upbringing and surrounding conditions throughout their life have enabled them to develop the 'nationality characteristics' which are essential for the performance of the duties of nationals and entitle them to the rights and privileges bound up with the status of nationality. That is why residence requirements represent a salient feature of the laws of many countries. The importance attached to residence in a particular country as a proof of the identification of the individual with this country and, thus, as a pre-

requisite for the possession of nationality, is based on sound principle. An individual living in a particular society acquires its language, habits and aspirations through immediate and daily contact. * * *

It may also be noted that, *generally, the conditions for naturalisation aim at ensuring the sufficient assimilation into the national life of the country of the potential citizen, or of the new citizen. Here, again, residence requirements, either prior or subsequent to naturalisation, play a prominent part.* [Emphasis added.]

The problem of allegiance and assimilation which occurs in the case of naturalized citizens returning to their former homelands is not a mere theoretical one. On the contrary, it was considered by Congress in passing the provision in the Nationality Act which was the identical predecessor to the Section of the 1952 Act involved here. It is perfectly clear that both the 1938 cabinet committee on which Congress relied and Congress itself regarded protracted residence by a naturalized citizen in the country of his birth or former nationality as importing a serious compromise of his allegiance. The cabinet committee, for example, observed that such residence "has rendered it difficult to make fully effective the principle, which this Government has long sought to maintain, that naturalization involves a complete change of national character and termination of prior allegiance." *Nationality Laws of the United States,* Part I,

House Committee Print, 76th Cong., 1st Sess. 71 (1938). The committee went on to explain (*ibid.*):

> Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated.

In its letter of transmittal to the President, the committee explained that a basic purpose of all of the proposed expatriation provisions was "to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States." *Nationality Laws, supra,* p. vii. It also stated, after observing that naturalization is conditioned on an intention to reside in this country permanently that (*ibid.*):

> When a naturalized citizen abandons his residence in the United States and takes up residence in the state of which he was formerly a national, definite termination of his American citizenship should follow.

In testifying on the draft statute, Mr. Flournoy, the Assistant Legal Advisor of the State Department, said that (*Hearings before the House Committee on*

Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess. 36-37):

> [A] still more serious reason why the Department of State is interested in this measure is that under the laws now existing we have thousands of persons living in foreign countries, usually in the foreign countries where they were born, or where their parents were born, having all their interests there, and their family connections, and yet they are citizens of the United States, and they may call on our Government for protection.
>
> I refer not only to the naturalized citizens who have gone back to their native lands or gone to other countries—and there are many thousands of them—but to their children, born in those countries, who are alien in all of their characteristics and connections and interests, yet have the right to enter the United States as citizens.

The Senate report on the bill that became the Nationality Act of 1940 stated (S. Rep. No. 2150, 76th Cong., 3d Sess. 4):

> These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State nominal citizens of this country who are abroad but whose real interests, as shown by the conditions of their foreign stay, are not in this country.

During the debates, the chairman of the committee reporting the bill, Representative Dickstein, emphasized that the purpose of the bill was to terminate the citizenship of "those who reside in foreign lands and

only claim citizenship when it serves their purpose" (86 Cong. Rec. 11944), and the bill's sponsor, Representative Rees, observed that a naturalized person residing in his native land "is not likely to have any real attachment to the principles of the Constitution of the United States" (86 Cong. Rec. 11948).

The relationship between residence and allegiance underlies the requirement for residence before naturalization which has been part of our system from the beginning. This relationship is also meaningful in reverse, particularly when the residence is in the country of former nationality to which, in most cases, the cultural ties are close. Surely it was reasonable for Congress to conclude that the native's reversion to a supposedly abandoned way of life would put such a strain on his American allegiance that it could not normally be expected to survive. By the same token, Congress was warranted in concluding that his allegiance to his native land might be significantly revived. Obviously expatriation, not merely loss of protection, was necessary to remedy this problem. Accordingly, we submit, it was a reasonable exercise of the Congressional power to regulate citizenship and to deal with serious compromises of allegiance for Congress to provide for the expatriation of naturalized citizens who return to their former homeland for a long period of time.[37]

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[37] Appellant contends (Br. 70–73) that Section 352(a)(1) creates "a conclusive presumption that naturalized citizens have abandoned their allegiance to the United States." A conclusive presumption cannot be rebutted and is not properly a presumption at all; instead, it is actually a misleading name

Moreover, it must be emphasized in the present case that appellant's American citizenship was granted upon the foregoing terms. The 1940 Act had the same provision as the 1952 Act—expatriating any naturalized citizen who returned to his former homeland for over three years. Consequently, when appellant's mother was naturalized and appellant herself acquired citizenship by derivation in 1950, Congress had already imposed as a condition of naturalization that the citizen not return to his former homeland for over three years. When appellant broke this condition, she automatically lost her citizenship.

D. THE DIFFERENTIATION BETWEEN NATIVE-BORN AND NATURALIZED CITIZENS IS NOT INVIDIOUS BECAUSE IT IS ONLY THE RESIDENCE OF NATURALIZED CITIZENS IN THE COUNTRY OF THEIR ORIGIN THAT CAUSES THE INTERNATIONAL COMPLICATIONS THE STATUTE SEEKS TO ALLEVIATE

Appellant contends (Br. 22–57) that Section 352(a)(1) discriminates invidiously against naturalized citizens in violation of the due process clause of the Fifth Amendment. Her argument is that it is both too

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for an ordinary rule of law because its sole effect is to attach legal consequences to particular conduct. 9 Wigmore, *Evidence*, Sec. 2492 (3d ed., 1940); McCormick, *Evidence*, Sec. 308 (1954); Morgan, *Basic Problems of Evidence* 31 (1961). Thus, Section 352(a)(1) provides for expatriation when a naturalized citizen returns to his former homeland. This provision is proper, not because in all such instances the citizen creates international problems or transfers his allegiance, but because this often occurs. As we will show (pp. 77–80), Congress has the power to use general classifications in attempting to remedy evils before it as long as those classifications are reasonably related to the problem even though the problem is not in fact produced by every person within the classification.

narrow and too broad—that it invidiously discriminates because it applies only to naturalized and not all citizens; and that it also invidiously discriminates by including all naturalized citizens, not only those particularly likely to cause international problems. We will discuss below (pp. 77–81) whether Congress was required to confine Section 352(a)(1) more narrowly than it did. Here, we will show that Congress did not discriminate invidiously against naturalized citizens.

Appellant's contention, if correct, would mean that Congress has the power to expatriate all American citizens residing in any foreign country for three years, but could not enact a more narrowly confined statute limited to naturalized citizens who returned to their former homelands.[28] We submit that the virtue, not the vice, of the present statute is that it is narrowly drawn. We have seen that the greatest likelihood of citizens embroiling the United States in foreign conflict as a result of their residence abroad, as well as the greatest likelihood that citizens residing for a long time abroad have transferred allegiance to a foreign country, is in the case of naturalized citizens returning to their former homelands. Congress in Section 352(a)(1) enacted a statute restricted to these precise situations.

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[28] Elsewhere, appellant contends (Br. 57) that Congress has no power to provide for the expatriation of any citizens for residence abroad. Here, however, we are considering only appellant's claim that naturalized citizens are being arbitrarily discriminated against.

In dealing with other problems of foreign residence, Congress has recognized that not all are of the same degree of seriousness. Thus, residence by a naturalized citizen in a country other than the one of his origin is somewhat less likely to cause the kind of problem with which Congress was most concerned; therefore, the period of residence before expatriation takes place is five years instead of three, and the exceptions to this five-year provision are much broader than those applicable to the three-year provision involved in this case.[*] Similarly, certain classes of foreign-born persons who are citizens at birth are considered to be a sufficiently potential source of difficulties (albeit less so than naturalized citizens) that they are subject to certain disabilities and requirements in relation to residence abroad (see pp. 73–74 below). Plainly, Congress may thus legislate in proportion to the problem perceived; it may attach grave consequences to what it considers to be the most serious and troublesome conduct and lesser consequences to conduct not deemed to be of equal danger. *E.g., Hirabayashi* v. *United States,* 320 U.S. 81, 100; *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S, 483, 489. Indeed, it would be irrational for Congress to act otherwise.

The test under the Fifth Amendment is whether the classification in question has a foundation in reason. As the Court pointed out in *Bolling* v.

[*] Cf. Section 353, 8 U.S.C. 1485, with Section 354, 8 U.S.C. 1486. Illustrative is the fact that appellant would have been free to reside permanently in a country other than Germany (the country of her origin) because she qualifies under one of these broader exceptions (see App. Br. 25).

Sharpe, 347 U.S. 497, 499, "discrimination may be *so unjustifiable* as to be violative of due process" (emphasis added). But, as the quotation implies, not all differentiations are banned.

As we have seen above, Congress had persuasive reasons for limiting the statute to naturalized citizens returning to the country of their former nationality. In terms, the statute does not even discriminate between naturalized and native-born citizens since the latter have no country of former nationality. It is true, of course, that the native-born citizen can reside in *any* foreign country without loss of citizenship, while Section 352(a)(1) restricts the period in which naturalized citizens may reside in one country.[40] This Court, however, has many times upheld distinctions of more significance and impact. See, *e.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (ancestry); *Terrace* v. *Thompson*, 263 U.S. 197 (alienage); *Heim* v. *McCall*, 239 U.S. 175 (alienage); *Porterfield* v. *Webb*, 263 U.S. 225 (alienage); *Ohio ex rel. Clarke* v. *Deckebach*, 274 U.S. 392 (alienage). In each of these cases, the Court sustained differentiations of treatment as among different classes of persons upon a showing that the classification was reasonably devised to meet a demonstrated need. Likewise, in *Mackenzie* v. *Hare*, 239 U.S. 299, on the basis of far less compelling evidence than that supporting Section 352(a)(1), the Court sustained a statute suspending the citizenship of American

[40] Section 352(a)(2) provides for the expatriation of naturalized citizens who reside five years in any country other than their homeland but that section is not involved in this case.

women who married foreigners, even though the citizenship of an American male was not subject to suspension upon marriage to a foreign woman.

Distinctions between native-born and naturalized citizens in connection with foreign residence have a basis in almost 175 years of history. Indeed, as we have seen (pp. 16–17), the Constitution draws several such distinctions itself. Thus, only a natural-born citizen may become President. Art. II, Sec. 1. A naturalized citizen must wait at least seven years after he obtains his citizenship before he is eligible to sit in the House of Representatives, Art. I, Sec. 2, and he must wait at least nine years before he can sit in the Senate, Art. I, Sec. 3. In the very first Congress it was proposed to expatriate naturalized citizens who resided abroad, and there was no objection on constitutional grounds during the debate (see pp. 17–18 above). During the nineteenth century, only naturalized citizens were, as a general rule, expatriated or denied protection on grounds of foreign residence (see pp. 23–24, 28–29 above). For nearly 100 years our naturalization treaties have provided for expatriation of naturalized citizens upon the basis of foreign residence (see pp. 27–28, 46 above). Despite the detailed criticisms by numerous groups of the 1952 Act before it was adopted—including Section 352(a)(2)—not a single witness at the hearings objected to Section 352(a)(1). Indeed, it is significant that even so severe a critic of the present immigration and nationality laws as Americans for Democratic Action suggested that this section was a reasonable

regulation (see pp. 42–43 above). And at least 26 other countries expatriate naturalized, but not native-born citizens, who reside abroad (see pp. 46–49 above).

The present citizenship laws of this country contain a number of additional differentiations between classes of native-born citizens, none of which seems open to serious question. Thus, under Section 301(a)(7), (b) of the Immigration and Nationality Act of 1952, a foreign-born child of one citizen parent and one alien parent, though a native-born citizen of this country, loses that citizenship if he fails to come to the United States prior to the age of twenty-three to live for at least five continuous years;[41] foreign-born children of two citizen parents have no such obligation. Under Section 350, a native-born citizen of dual nationality loses his citizenship if he resides for three years in the country of his other nationality and claims benefits from that country after the age of twenty-one, unless, prior to the expiration of the three-year period, he takes an oath of allegiance before an American diplomatic or consular official;[42] no such disability attaches to native-born citizens who do not happen to have another nationality.[43]

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[41] 66 Stat. 235, 8 U.S.C. 1401(a)(7), (b). In order for the child to qualify as a citizen under this provision, the citizen parent must have resided in the United States for ten years, five of which were after the age of fourteen. Appellant's children are governed by this provision.

[42] 66 Stat. 269, 8 U.S.C. 1482. Appellant's children could be subject to this provision.

[43] There are other provisions relating to loss of nationality which apply only to dual nationals. See 66 Stat. 267, 8 U.S.C. 1481(a)(4)(A), (b).

There is nothing "invidious" about the distinction Congress made when it enacted Section 352(a)(1) (see App. Br. 22–57), nor does that distinction brand naturalized citizens as an inferior group of citizens (App. Br. 23–31). It simply recognizes, on the basis of experience and history, that naturalized citizens—through no real fault of their own—are very likely to become international problems when they reside at length in the country of their origin—far more likely than other citizens residing abroad. Congress, seeking in good faith to avoid such problems, perforce had to focus on the group which gives rise to them, but it did not do so "invidiously." In effect, it called upon all naturalized citizens either to cooperate with this, their adopted country, by not putting themselves in a position where they were likely to bring it into conflict with other nations, or to accept the only alternative calculated to resolve any difficulties that might attend their refusal thus to cooperate: termination of their citizenship. That they must make this choice is no reflection on their loyalty or reliability (see App. Br. 36–42); it is dictated by the hard facts of experience in the foreign relations of this country.

It is relevant, too, in considering the reasonableness of the classification adopted in Section 352(a)(1), that, generally speaking, its effects are far less severe

as applied to naturalized citizens than they would be as applied to native-born citizens. In many instances, the naturalized citizen will also be a citizen of the country of his origin, so that he will not be rendered stateless; in most other instances (as in this case), his peculiar connection with that country will make it easier for him to obtain its citizenship." In any event, he will be resident in the country of his birth or former citizenship (or both), which will ordi-

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" We have been able to acquire information on the nationality, laws of 74 countries and have found that, after three years' residence, a naturalized citizen would either have, or be eligible to reacquire, citizenship in 56 countries—because he did not lose his citizenship by being naturalized in the United States, because he automatically reacquired citizenship under the provisions of a Bancroft treaty after a residence of less than three years, or because he could be naturalized after a residence of three years or less. The laws of the remaining 18 countries create varying periods of statelessness. In ten countries (Austria, Cuba, Ghana, Indonesia, Ireland, Liberia, Pakistan, Saudi Arabia, Southern Rhodesia, and Yugoslavia), a residence of two years or less would be required in addition to the three years which gave rise to expatriation by this country. Reacquisition of citizenship in the Sudan would require an additional seven years, and in San Marino an additional 33 years. In Belgium and Malaysia, it would require an additional residence of from one to eight years, depending upon how long the applicant resided in those countries before his emigration. Reacquisition of citizenship in Paraguay and Rumania requires an act of the legislature. Albania and Poland appear to treat reacquisition as discretionary.

narily mean that he has family connections and old friends there, speaks the language, understands the customs—in short, that he will find it relatively easy to become reassimilated into the population from which he originally sprang and to which he has chosen to return. By contrast, the native-born American citizen would usually have few if any of these special associations other than those he might have accumulated during the period of residence prescribed in the statute. He would be in a markedly more difficult position to pick up the threads of a normal existence in a new country. Consequently, even if the foreign affairs problems were the same for naturalized and native-born citizens, Congress could have reasonably determined that the danger did not justify the serious consequences of expatriation to native-born citizens but did justify the far lesser consequences to naturalized citizens.

In short, Congress, in order to meet the foreign affairs problem confronting it, was not required to say that no citizen, native-born or naturalized, could reside in any country for more than a given period without expatriating himself when experience has shown that the problem of naturalized citizens residing in the country of their origin has far greater potential for causing problems than foreign residence

by citizens under other circumstances. Congress was not required to legislate with respect to all citizens in the name of equality or what Mr. Justice Holmes referred to as "abstract symmetry." *Patsone* v. *Pennsylvania*, 232 U.S. 138, 144. Instead, Congress may legislate with respect to one problem at a time; it "may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." *Hirabayashi* v. *United States*, *supra*, 320 U.S. at 100; accord, *United States* v. *Petrillo*, 332 U.S. 1, 8–9; *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489; *Patsone* v. *Pennsylvania*, *supra*. Congress did exactly that in Section 352(a)(1). Its decision was not unreasonable.

B. THE STATUTE IS NOT ARBITRARY BECAUSE IT IS NOT MORE NARROWLY DRAWN

Appellant contends (Br. 42–43) that Congress acted arbitrarily in making foreign residence the controlling fact under Section 352(a)(1) because foreign residence alone does not give rise to problems with other countries. She goes on to argue that such problems arise "only when such residence is accompanied by other factors such as dual nationality and refusal of a foreign state to recognize American naturalization." We submit that this claim is based on an extraordinarily narrow view of Congress' power to regulate areas within its authority.

Congress has the power, in regulating problems before it, to legislate by making classifications. In doing so, the classification must bear a direct relationship to the problem which the statute seeks to remedy. Otherwise, the statute is invidiously discriminatory in violation of the due process clause of the Fifth Amendment. On the other hand, classifications may include persons who, as a matter of fact, do not pose the precise problem at which the statute is aimed.

These propositions are based directly on numerous decisions of this Court. In *Westfall* v. *United States*, 274 U.S. 256, 259, the Court stated that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented, [Congress] may do so." Similarly, in *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 710–711, the Court stated: "[I]f evils disclosed themselves which entitled Congress to legislate as it did, Congress had power to legislate generally, unlimited by proof of the existence of the evils in each particular situation. See also, *e.g.*, *American Communications Assn.* v. *Douds*, 339 U.S. 382, 406; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201–202, and the cases therein cited.

Applying these rules here, serious foreign conflicts have arisen, as we have seen, as a result of prolonged residence of naturalized citizens in their former homelands. Congress was not required to limit the application of the statute to those individuals whose residence abroad actually caused international difficulties. As this Court pointed out in the *Perez* case, Congress must have latitude to regulate matters affecting the

foreign affairs of this country "on more than an *ad hoc* basis." 356 U.S. at 59. Thus, the Court in that case did not restrict Congress to providing for loss of nationality only with respect to foreign voting that in fact stirred up an international controversy or even to such voting in countries which objected to voting by aliens. Section 352(a)(1), as shown above, is an effective means of relieving international tensions for the very reason that it expatriates naturalized citizens *before* they create difficulties. To require Congress to wait until the difficulties occur, as appellant suggests (Br. 46), would frustrate the entire purpose of the provision. Manifestly, individualized treatment is not required in relation to such a general problem as the conduct of international affairs.

Similarly, Congress could reasonably decide to provide for expatriation even though the Department of State had not ascertained that conflicts would likely result with the particular country involved. Appellant states (Br. 42) that problems have arisen only where the citizens were dual nationals either because the foreign state refused to recognize American naturalization or because the naturalized citizen's return for a substantial period of time automatically resulted in the reacquisition of citizenship. In addition, however, such difficulties have also arisen because the foreign government believed that its former citizen owed obligations to it beyond those of the ordinary alien residing within its territory, even though he did not actually reacquire his old citizenship. To require the Secretary of State to ascertain whether such conturned for a substantial period of time automatically

ditions existed in each country would require subtle determinations involving not only the law but the policies of scores of foreign states and their application to a variety of different circumstances. It would not be enough to make such a determination on the existing facts; one would have to make predictions for the future. The reason for the present statute is that Congress found that the previous provisions were extremely difficult to administer and therefore failed to solve the foreign affairs problems (see pp. 36–37 above). Moreover, even if such determinations were feasible, the result would be very unfair to naturalized citizens residing abroad. In place of the clear standards provided in Section 352(a)(1), there would be uncertain ones: the citizen would not know whether he had expatriated himself until a determination was made, *i.e.*, after the die was cast. His rights would turn on the law and policies of foreign government which might change, without his knowledge, in such a way as to deprive him of his citizenship. In short, Congress could most reasonably conclude that the clear line drawn by Section 352(a)(1) was the most feasible one for efficient administration by the State Department, for the protection of naturalized citizens, and for the prevention, in advance of the event, of foreign entanglements.

Congress has in fact confined the class of persons coming within Section 352(a)(1) more narrowly than *all* naturalized citizens residing in their former homelands in order to exempt persons not likely to cause problems with foreign countries or to transfer their allegiance to them. Section 353, 66 Stat. 270, 8 U.S.C.

1485 (see pp. 3–5 above).[*] Thus, exceptions are made for persons employed by the United States government or United States companies. Section 353 (1)(4). Their open and obvious connection with this country tend to discourage inconsistent demands upon them by foreign governments; moreover, their stays are less likely to prove permanent. Certain aged and disabled persons are excepted. Section 353(2), (3), (5). Their disabilities greatly reduce the likelihood that demands will be made upon them, and they would be unlikely to be raising young children so that, if reversion to their former culture and allegiance occurred (see pp. 60–61 above), its effect would not be carried over into a new generation. Persons living abroad for purposes of education or for certain emergency reasons (such as family illness) are excepted. Section 353(5), (6). Again their residence is apt to be less than permanent. Finally, each of the exceptions—save possibly that for aged and disabled persons—deals with situations which are not inconsistent with allegiance to the United States and a desire to return here. Congress was not required to make further distinctions. The classifications established, limited by the exceptions, came as close to describing the most probable sources of international complications as could reasonably be expected.

[*] Appellant's discussion (Br. 32, 68) of the exceptions to Section 352 is almost entirely devoted to Section 354, which contains the exceptions to Section 352(a)(2), a provision not at issue in this case. It is Section 353 that contains the exceptions to Section 352(a)(1). The exception relied on by the *amicus* (Br. 30) as to veterans also concerns only Section 352(a)(2).

II

EVEN IF SECTION 352(a)(1) WERE UNCONSTITUTIONAL IF APPLIED TO SOME SITUATIONS WITHIN ITS TERMS, IT IS REASONABLE AND THEREFORE CONSTITUTIONAL AS APPLIED TO APPELLANT, WHO IS DOMICILED ABROAD WITH NO INTENT TO LIVE IN THE UNITED STATES

We have seen (pp. 57–68) that Congress considered the fading loyalty of the naturalized citizen who returns to his homeland and the tendency to take up again its bonds and culture as important reasons justifying Section 352(a)(1). These considerations are especially pertinent in the present case. Appellant is married to a German national and makes her home in Germany. She has stated that she intends to remain with her husband where he practices his profession; that since his law practice is in Germany it appears likely that she will remain there for the indefinite future although she would hope to be able to visit the United States frequently (R. 10). Even if the statute were deemed an unconstitutional exercise of Congress' powers with respect to a naturalized citizen who merely resides in the country of his former nationality for three years, it is surely constitutional as applied to a person, like appellant, who not only resides for the requisite period in the country of her former nationality but is domiciled in that country and has no intention to return to the United States to live.

Appellant has abandoned not only her residence but her domicile in the United States for one in Ger-

many. As Mr. Justice Holmes stated in *Williamson v. Osenton*, 232 U.S. 619, 624:

> The essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere, Story on Conflict of Laws, § 43—or, as Mr. Dicey puts it in his admirable book, "the absence of any present intention of not residing permanently or indefinitely in" the new abode. Conflict of Laws, 2d ed. 111.

Accord, *Restatement, Conflict of Laws*, Section 18, comment *c* (1934). More recent formulations deem it irrelevant that a person retains an intent to return eventually, and they hold that domicile is acquired if the person "intends to remain in the place for a time at least." See *Restatement (Second), Conflict of Laws*, Sec. 18, comments *b, c* (Tent. Draft No. 2, 1954). Applying these principles to appellant, she is domiciled in Germany since she has no intention of returning to the United States to reside permanently either now or even in the future.

As we have shown earlier (pp. 28–36), residence in the country of former nationality without an intent to return is an expatriation standard with a long history. It was used by the Department of State to expatriate citizens in the nineteenth century; it was crucial under administrative regulations relating to the presumption of expatriation under the 1907 Act; and it has been the standard used for one hundred years to expatriate naturalized citizens under the Ban-

croft treaties.[46] Surely a practice deemed reasonable by so many persons for so many years, and whose constitutionality was never questioned before the instant case, is neither arbitrary nor irrational.[47] All of the reasons discussed above, which justify the statute on its face, apply with even greater force to aliens residing in the country of their former nationality and maintaining their permanent homes there. Such persons are the ones most likely to be subject to demands by the country of their prior nationality; they are also most likely to renew full attachment to the country of residence and to lose all meaningful ties to the United States.

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[46] Bancroft treaties are now in force with twenty-one countries. The treaties with twenty countries provide for the expatriation of naturalized citizens who reside in their native countries without an intent to return to the United States. Two years' residence creates a rebuttable presumption of lack of intent to return. The treaty with the remaining country, Belgium, makes no mention of expatriation; it merely provides for a naturalized citizen's reacquiring his original citizenship by returning to Belgium and complying with her citizenship laws. See 16 Stat. 747.

The validity of the treaties with twenty countries incorporating a standard similar to Section 352(a)(1) as applied to appellant will be affected by the outcome of the instant case. Whether a treaty can be invalid under the Fifth Amendment presents a delicate question of constitutional law which this Court has never decided. See "Memorandum of the Department of Justice on S.J. Res. 130, 82d Congress, Proposing an Amendment to the Constitution of the United States Relative to the Making of Treaties and Executive Agreements." *Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S.J. Res. 130*, 82d Cong., 2d Sess. 396.

[47] During the nineteenth century, the propriety of expatriation on such grounds was questioned, but to our knowledge no one challenged its rationality or Congress' constitutional power.

Moreover, the impact of the expatriation law upon the individual is much less onerous when the naturalized citizen has no desire to return to the United States. He is not actually barred from the country of his adoption. Instead, the expatriate loses only the diplomatic protection of the United States, the opportunity to make visits without a visa, and the right to return if adversity or some other unforeseen circumstances makes this desirable some time in the future. In effect, appellant is seeking the benefits of citizenship while remaining a foreigner. Cf. *Luria v. United States,* 231 U.S. 9. Surely Congress is not constitutionally required to allow citizenship to be retained in such circumstances.

The statute may thus be sustained as to appellant without the necessity of deciding its validity in other situations. This Court held in *United States* v. *Raines,* 362 U.S. 17, that state voting registrars had no standing to contend that the broad language of a civil rights statute permitted unconstitutional applications when that statute, as applied to them, was plainly constitutional. The Court went on to say (*id.* at 21):

> This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the ne-

> cessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration,* 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

See, generally, Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L. Rev. 76, 82–106 (1937). Moreover, all doubt as to the intent of Congress in the instant case is removed by Section 406 of the Immigration and Nationality Act of 1952, 66 Stat. 281 (see p. 5 above) which specifically provides that the invalidity of a particular application of any provision of the Act shall not affect the validity of other applications. Consequently, since Section 352(a)(1) is reasonable and constitutional as applied to appellant, it is irrelevant that it might arguably be unconstitutional as applied to other persons in different situations.

III

SECTION 352(a)(1) IS NOT PENAL IN NATURE AND THEREFORE DOES NOT VIOLATE THE FIFTH, SIXTH, OR EIGHTH AMENDMENTS

Appellant advances two arguments which rest upon the premise that the statute is punitive: first, that punishment has been imposed without the procedural

safeguards required in criminal proceedings by the Fifth and Sixth Amendments (Br. 64–69); and second, that the punishment is cruel and unusual in violation of the Eighth Amendment (Br. 73–75). The short answer is that the statute is not penal.

This Court held in *Trop* v. *Dulles*, 356 U.S. 86, 96, and reaffirmed in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169, that in determining whether a law is penal, the primary question is the purpose of the statute. Appellant does not point to a single word in the legislative history that would suggest a penal purpose for the enactment of Section 352(a)(1). Nor could she, for, as we have seen (pp. 15–46), the whole background of the statute, as well as its immediate legislative history, shows that it was enacted to accomplish regulatory purposes: first, to meet the foreign policy problem when naturalized citizens in the former homeland are treated by the foreign governments as their own citizens; and, second, to remove citizenship from persons who are likely to have retransferred their primary allegiance from the United States to the country of their origin.

Only when the legislative history is inconclusive will this Court look to other factors in determining whether a statute is penal. *Kennedy* v. *Mendoza-Martinez, supra*, 372 U.S. at 169. Since the legislative history of Section 352(a)(1) shows conclusively that it was not designed to impose punishment, appellant's reliance upon the other factors enumerated in *Kennedy* v. *Mendoza-Martinez, supra*, 372 U.S. at 168–169, is misplaced.

Even were the history less persuasive and the factors listed in the *Mendoza-Martinez* opinion applied to Section 352(a)(1), the Section would still not be penal. The statute is an appropriate and reasonable means of solving the problems created by the prolonged residence of naturalized citizens in their countries of origin. The mere fact that a statute provides for expatriation does not render it penal. *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 164. Otherwise, contrary to the decisions of this Court, expatriation would always be invalid unless imposed after a criminal trial. See *Perez* v. *Brownell,* 356 U.S. 44; *Savorgnan* v. *United States,* 338 U.S. 491; *Mackenzie* v. *Hare,* 239 U.S. 299. Expatriation for continuous residence abroad has traditionally been regarded as regulatory rather than penal. See U.N. Secretariat, Dept. of Social Affairs, *A Study of Statelessness* '39 (1949); Jessup, *A Modern Law of Nations* 75–76 (1948). Thus, in the United States, it has been regarded for well over a century as a means of preventing conflict with foreign countries.

The statute does not promote the traditional aims of punishment. See *Trop* v. *Dulles, supra,* 356 U.S. at 111–112 (concurring opinion). While it may have an incidental restraining effect on some persons, its primary purpose is not to deter naturalized persons from living abroad but to remedy difficulties which thereby result for this country. Unlike the situation in the case of most penal statutes, *scienter* need not be found. Residence abroad is not criminal under any statute so that expatriation here cannot be said to provide an additional sanction for behavior already

a crime. And since residence abroad is not morally reprehensible, it is inherently unlikely that Congress would seek to punish it."

In short, there is not the slightest basis in either the legislative history or elsewhere for considering Section 352(a)(1) as penal. Consequently, it does not violate the Fifth or Sixth Amendment by failing to provide a criminal trial or impose cruel and unusual punishment in violation of the Eighth Amendment."

"Section 352(a)(1) bears no resemblance to the different expatriation provisions of the Immigration and Naturalization Act which were held penal in *Kennedy* v. *Mendoza-Martinez* and *Trop* v. *Dulles*. The legislative history of the provision before the Court in *Mendoza-Martinez*—which expatriated persons leaving the country to evade military service—strongly indicated that Congress employed expatriation as an additional penalty for conduct already criminal. 372 U.S. at 169–170, 184. And in *Trop*, this Court could find no other rational purpose for expatriating wartime deserters except to impose punishment. 356 U.S. at 97, 109.

"Appellant also argues (Br. 24–26) that Section 352(a)(1) infringes upon the "right to travel." Plainly, however, the statute does not affect the right of any person to travel where he will, when he will; it touches only prolonged *residence* in a *single* foreign country. Furthermore, even if viewed as a restriction on foreign travel, as we show in our brief in *Aptheker* v. *The Secretary of State*, No. 461, this Term, pp. 11–13, the right to travel, like all the rights protected by the due process clause, is subject to reasonable regulation by Congress. Nothing in this Court's decision in *Kent* v. *Dulles*, 357 U.S. 116, suggests that reasonable restrictions on the right to travel are beyond the power of Congress to authorize. See 357 U.S. at 127. Section 352(a)(1) is a reasonable regulation in order to prevent conflict with foreign countries and to ensure that American citizens have primary allegiance to the United States.

CONCLUSION

Appellant asks this Court to hold that Congress can make no distinction whatever between native-born and naturalized citizens. Nothing in our traditional concepts of citizenship or in our history furnishes support for such an inflexible rule. It is evident that the residence of naturalized citizens in their former homeland has a significantly different effect than the residence of other citizens abroad. The experience of this and other countries shows that such a course of conduct by the naturalized citizen is a source of international conflict. The remedy of expatriation is directly related to the problem and, we submit, within the constitutional powers of the Legislative Branch. Accordingly, the judgment below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually, and as Secretary of State, *Appellee*.

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I. THE NATURALIZATION POWER DOES NOT INCLUDE THE POWER TO CREATE A SECOND-CLASS CITIZENSHIP CONDITIONED ON SUBSEQUENT CONDUCT.

Appellee, now for the first time in these lengthy proceedings, openly recognizes that Section 352 of the Immigration and Nationality Act of 1952 can be sustained only if Congress, under the Constitution, has the power to create a special conditional class of citizenship for naturalized citizens.

Appellee has done extensive research and has devoted nearly one-half of its brief in an effort to prove that the power of Congress "to establish a uniform rule

of naturalization" includes the authority to make naturalization conditional upon subsequent conduct and thereby create a separate inferior class of citizenship.

Appellee's efforts to find constitutional authority for Congress to create such a second-class citizenship fail to reveal any basis for the existence of such a power. On the contrary, they confirm the decisions of this Court which express in clear terms the equality of native-born and naturalized citizens and which negate any constitutional right to create a more vulnerable second-class type of citizenship for the naturalized.

In its efforts to establish the existence of such a power of Congress, the appellee lightly passes over *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 738 and other decisions of the Court which have pronounced in clear terms the equal dignity of citizenship acquired by naturalization.[1]

The classic formulation of this principle by Chief Marshall in *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) *supra* at 827-828, is quoted in full on page 27 of appellant's brief, but one section we believe merits repetition here:

> "A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to

[1] See Resp. Br. 59. (Appellee's brief entitled "Brief for Respondent" is herein referred to as "Resp. Br." and Appellant's principal brief as "Br.".)

> prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. (22 U.S. at 827).

See also, *United States* v. *Wong Kim Ark*, 169 U.S. 649. The equality of the naturalized citizen in all respects "save only that of the eligibility to the presidency" has been repeatedly confirmed by this Court. *Luria* v. *United States*, 231 U.S. 9, 21; *United States* v. *MacIntosh*, 283 U.S. 605, 624; *Knauer* v. *United States*, 328 U.S. 654, 658.

Appellee, in an effort to overcome the clear meaning of the decisions of this Court, has made a random and extensive search for materials including the debates at the Constitutional Convention and in the First Congress. These materials, however, do not support the claimed power on the part of Congress to create a second-class citizenship, but establish the correctness of the *Osborn* and subsequent decisions cited above.

We shall examine seriatim the attempts made by appellee in this direction.

(1) Appellee contends that "the Constitution embodies the concept . . . that citizenship is a gift which may be bestowed with conditions subsequent as well as precedent." (Resp. Br. 59, see also 15-18).

Appellee purports to find this concept in the constitutional provisions which state that a naturalized citizen may not become President (Article II, Sec. 1), and must wait 7 to 9 years respectively before he is eligible to sit in the House of Representatives and in the Senate. (Article I, Secs. 2, 3).

As this Court has repeatedly held, these political disabilities provided for in the Constitution are exclu-

sive. Congress has no power to limit the rights of naturalized citizens in any other respect. As Chief Justice Marshall stated in *Osborn* v. *Bank of the United States, supra*, 22 U.S. at 827-28, a naturalized citizen "is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction." See also, e.g., *Luria* v. *United States, supra*, 231 U.S. at 21.

Further, the history of these constitutional provisions shows that they are exclusive and impose not conditions on citizenship itself, but limitations on the exercise of the special privileges of holding specified public offices, not necessary incidents of citizenship as such. These provisions of the Constitution are based on the laws which some of the individual states enacted prior to the adoption of the Constitution. The laws of Maryland, Delaware and Virginia, for example, expressly stated that naturalized citizens shall have equal rights to the native-born citizens, with the single exception of eligibility, at least for certain periods of time, to hold public office. H. Doc. No. 326, 59th Cong. 2nd Sess. p. 8.[2]

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[2] The Citizenship Board appointed in 1906 to study the naturalization laws of the United States referring these state statutes stated:

> "The effect of naturalization in the several states before the Constitution was therefore to remove alienage, the persons naturalized standing in all respects upon the same plane with the natural born citizen, except that he has certain removable political disabilities.
>
> The same principle was applied in constructing the Constitution and in the debates in the Constitutional Convention no one proposed any other principle." H. Doc. No. 326, 59th Cong. 2d Sess. p. 9.

It is thus clear that the framers of the Constitution considered public office to be a special privilege which was not an essential

(2) Appellee (Resp. Br. 16-17) seeks to deduce a Congressional power to attach conditions subsequent to naturalization from the position taken by Madison and Hamilton at the Constitutional Convention. They opposed writing into the Constitution the provisions establishing residence requirements for naturalized citizens to sit in Congress on the ground, among others, that such conditions were unnecessary because Congress

> "is to have the right of regulating naturalization and can by virtue thereof fix different periods of residence as conditions of enjoying these privileges of citizenship." 2 Farrand, *The Records of the Federal Convention of 1787*, 235 (1911).

This statement is at the very most an indication that Congress, absent the constitutional provisions which were finally adopted, would have had the power to fix residence prerequisites which naturalized citizens must meet before they can exercise the "privilege" of holding public office. It does not support a power to condition the retention of the citizenship rights themselves, once granted.[3]

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part of citizenship. Likewise, the right to vote was not considered to be an essential part of citizenship at the time the Constitution was adopted. Discussing the situation in 1787, it is stated in I. Crosskey, *Politics and the Constitution*, p. 440 (1950):

> "• • • The acquisition of the right to vote sometimes confused nowadays with naturalization was not of its essence. Like eligibility to the Presidency or to service in Congress, the right to vote is a political privilege which has never been the right of the whole of our citizenry, even of the 'natural born variety.'"

[3] Indeed, it probably refers to the grant of some rights of citizenship in advance of naturalization (see 3 below).

(3) Appellee further tries (Resp. Br. 17-18) to find support for its position from the debates in the First Congress on the original naturalization bill. Nothing in these debates indicates the existence of a Congressional power to attach conditions subsequent to naturalization.

a. The debate on the original naturalization bill (1 Annals of Congress 1109, 1125 (1790)) dealt with the question whether Congress in adopting an uniform rule of naturalization should make residence for a certain number of years a prerequisite for naturalization. The draft before Congress included a residence requirement. A number of members urged striking this provision and providing that a person could become a citizen by merely taking an oath of allegiance to the United States. The group in favor of immediate naturalization was primarily concerned with the restrictions, such as land ownership, to which new immigrants, as aliens, would be subject if they did not become citizens on arrival.

In this context discussion arose whether this problem could be dealt with by so called "step-by-step" or "progressive" naturalization. The debates made it clear that what was considered was to bestow upon aliens in *advance* of naturalization such certain rights as land ownership, which were then normally enjoyed only by citizens. The Government misconstrues this idea of "step-by-step" or "progressive" granting of rights *before* naturalization as the withholding of rights of citizenship *after naturalization*.

Appellee's misconstruction of the meaning of these debates is largely premised on the misunderstanding of a statement made by John Lawrence of New York.

The Government states that Mr. Lawrence "suggested that the three conditions on naturalization written into the text of the Constitution might be exclusive and questioned whether Congress had the power to impose additional conditions." (Resp. Br. 17). Appellee then indicates that Mr. Madison in his reply confirmed the existence of such a power to condition citizenship. (Resp. Br. 18).

However, the discussion during the debate related only to the right of Congress to impose a residence requirement *before* naturalization. Lawrence argued that no such right existed and Madison argued to the contrary. This is clear from the language used by both.

Thus, when Mr. Madison stated:

> "It may be a question of some nicety, how far we could make our law to admit an alien to the right to citizenship step-by-step; but there is no doubt we may, and ought, to require residence as essential." 1 Annals of Congress 1112.

he was replying to an argument by Mr. Lawrence that Congress could not impose a residence requirement as as a prerequisite to naturalization. Mr. Lawrence stated that he was of the opinion that

> "... Congress has nothing more to do than point out the mode by which foreigners might become citizens. The Constitution had expressly said how long they should reside among us before they were admitted to seats in the Legislature; the propriety of annexing any additional qualifications is therefore much to be questioned." Id. at 1111.[4]

[4] What was meant by step-by-step or progressive naturalization was the bestowal of certain rights of citizenship *in advance of naturalization* also appears from the following statement made immediately after Madison's remark quoted above by Mr. Smith

In any event, even if Congress had a power to adopt a rule of naturalization which delayed the enjoyment of certain privileges until some period after naturalization, it is clear there is nothing in such a power which could condition upon future conduct the retention of citizenship itself when the citizenship was acquired in good faith.

b. Appellee in more general support of its thesis points to the statement made in the same debates by Alexander White of Virginia (Resp. Br. 11) suggesting that if the residence requirement was stricken "another clause ought to be added depriving [naturalized] persons of the privilege of citizenship, who left the country and staid abroad for a given length of time." (1 Annals of Congress 1110). It is clear from the context of this statement that the problem with which Mr. White was concerned was the fraudulent

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of South Carolina who described step-by-step or progressive naturalization as follows, id. at 1112:

> ". . . that a man shall be entitled to certain privileges at the end of one year's residence . . . more in two years, and the whole is completed in three years."

Or as Mr. Clymer similarly stated, id. at 1120-21:

> ". . . foreigners ought to be gradually admitted to the rights of citizenship; and that the residence of a certain time should entitle them to hold property; but the higher privileges of citizenship, such as electing or being elected in office, should require a longer term."

Indeed, for a long period of time, it was the law that one who had made a declaration of intention to become a citizen could enjoy "in the United States certain rights which commonly pertain to citizens of the several states and the United States." H. Doc. No. 326, 59th Cong., 2nd Sess. p. 19. Such rights included voting in both national and state elections, and the rights to hold real property in some states. Id. at 19.

acquisition of American citizenship, a problem with which Congress clearly may deal under the naturalization power.[5] See *Luria* v. *United States*, 231 U.S. 9.

(4) Appellee tries (Resp. Br. 18-19) to find some support for its position in the Jeffersonian argument that all men who have left their own country should be sufficiently relieved of ties to that country to give them the right to renounce their citizenship without the consent of their sovereign. This principle, which was in part expressed in the Act of July 27, 1868, 15 Stat. 223, relates to the right or option of the citizen to give up his citizenship without the consent of this government. This, of course, does not affect the right of the citizens residing abroad to retain his citizenship if he so desires to do so.

(5) The asserted power to impose a condition subsequent upon naturalization has never been employed by Congress any time prior to this legislation. The Nationality Act of 1907, 34 Stat. 1228, which created a rebuttable presumption that naturalized citizens who resided abroad for certain periods had expatriated themselves did not deal with citizenship, but only with the right of diplomatic protection. Any naturalized citizen who returned to the United States was per-

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[5] Mr. White urged that absent a residence requirement such a clause should be added because "[f]oreign merchants and captains of vessels might by this means evade the additional duties laid on foreign vessels." Mr. Madison, referring to Mr. White's statement, noted, id. at 1112:

> "Under such terms, it was well observed by my colleague, aliens might' acquire the right of citizenship, and return to the country from which they came, and evade the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America enjoying at the same time all the advantages of citizens and aliens."

mitted to enter as a citizen. *Camarado* v. *Tillinghast*, 29 F. 2d 527 (1st Cir. 1928); *United States* v. *Eliasen*, 11 F. 2d 785 (W.D. Wash. 1926); *Miller* v. *Sinjen*, 289 F. 388 (8th Cir. 1923). See also, 28 Op. Attys. Gen. 507, 508, 3 *Hackworth Digest of International Law*.[6]

The Bancroft Treaties similarly dealt only with a loss of protection. See, *Matter of O*, I. & N. Dec. 321, 323 (1951).[7]

(6) Appellee relies on administrative practice of the State Department. (Resp. Br. 23-24, 28-32). Such practice, as appears from the brief itself, never went so far as to assume that the citizenship of naturalized citizens was conditioned upon residence in this country after naturalization. Some officials believed that voluntary expatriation on the part of naturalized citizens residing abroad may be easier to establish, (see statement by Secretary of State Fish, (Resp. Br. 31), but none considered expatriation to flow automatically from such residence.

In summary, the Government's extensive and painstaking research to which it has devoted nearly half

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[6] The legislative history of the 1907 Act also indicates that the purpose of the Act was not to take away citizenship, but only to ascertain whether protection should be limited. See 41 Cong. Rec. 1466-1467 (1907.) For an excellent discussion on the legislative history of this Act see "Involuntary Loss of Citizenship by Naturalized Citizens Res ling Abroad," 49 Cornell L.Q. 52, 61-68 (1963). Of special pertinence here is the material quoted on page 63 n. 103, 66 n. 108.

[7] Indeed, the position that the Bancroft Treaties deal only with diplomatic protection and not with nationality as was taken by the United States State Department as recently as 1958 in the case before the Italian-United States Conciliation Commission, No. 82, In the Matter of Albert Flegenheimer, not yet published; copies available at the State Department.

of its brief fails to provide any basis for a Congressional power to create a special second-class citizenship for naturalized citizens.

II. THERE IS NO INHERENT POWER TO REGULATE CITIZENSHIP UPON WHICH THIS LEGISLATION COULD BE BASED.

Appellee's brief also seeks to sustain the challenged legislation on the basis of what it calls the "undoubted power" of the United States "to regulate its own national citizenship as an inherent right of sovereignty." (Resp. Br. 57). It claims that this power includes "the authority to deal with serious compromises of allegiance" (Resp. Br. 58-59), which fall short of conduct manifesting a transfer of allegiance from the United States to some foreign power.

This Court has never held that the Congress has such an inherent power to regulate citizenship nor does appellee cite any authority therefor. On the contrary, it seems clear from this Court's recent decisions in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 and *Trop* v. *Dulles*, 356 U.S. 86, that no such power exists.

Such a power to regulate citizenship would, if it were granted to Congress, permit it to expel from the body politic anyone considered undersirable by the legislature. It would give the same powers over the citizen's basic right to membership in political society as over the most minor commercial interests. Such an approach is totally alien to our system of constitutional government and personal rights.[8]

[8] If a power to "regulate citizenship" existed, Congress could take away the citizenship of any person whose views or activities were contrary to the prevailing opinion. The possibilities of such power are limitless.

III. THERE IS NO RATIONAL BASIS FOR THIS LEGISLATION AS A MEASURE TO DEAL WITH COMPROMISES OF ALLEGIANCE.

Appellee attempts to sustain the challenged legislation as a measure designed to deal with possible compromises of allegiance on the part of naturalized citizens residing in their country of origin and their possible reversion to their former nationality. Sought to be sustained on this basis, Section 352 is clearly arbitrary.

As shown in appellant's principal brief, Section 352 takes away citizenship regardless of individual allegiance on the basis of assumed group characteristics of naturalized citizens. It assumes that naturalized citizens who reside abroad are more likely to compromise their allegiance to the United States than the native-born.

Appellee, in its brief, attempts to sustain the legislation on precisely this group characterization. The Government argues that "[t]his provision is proper, not because in all instances the [naturalized] citizen . . . transfers his allegiance but it *often* occurs." (Resp. Br. 68, n. 37). The brief states that "Congress was warranted in concluding that his allegiance to his native land *might* be significantly revised" by residence there. In describing the possible compromise of allegiance by naturalized citizens residing in the country of his origin, the Government's brief continually uses such words as "often," "frequently," "generally" or "normally." (Resp. Br. 59, 61). This also reflects the thinking of the Cabinet Committee which recommended this legislation. See e.g. material quoted Resp. Br. 65-67.

An individual American citizen clearly may not be deprived of his citizenship on the basis of characteristics imputed to other or even most of his fellow citizens of the same class.

As we stated in our principal brief, pp. 31-34, no such power exists. We repeat from pp. 33-34:

> "The Congress has no power to segment and compartmentalize the citizenry and regulate them on the basis of assumed characteristics or tendencies of their race, religion, national origin or economic class. It must apply the same consequences to the same act whether or not, *a priori* or even on the basis of past conduct substantiated by statistics, it was more likely to be committed by a Jew, a Catholic, a Negro or a naturalized citizen, or indeed a poor man or a rich man."

The Government has been able to cite only a single case where this Court has upheld a discrimination between citizens on the basis of such assumed group characteristics. *Hirabayashi* v. *United States*, 320 U.S. 81. There, as the Court expressly stated, (id. at 100), the classification was upheld *only* because of the existence of war and the imminent threat of invasion. (See Br. 34).[9]

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[9] The other cases cited in support of a classification such as made here involved classification between aliens and citizens or between aliens ineligible for citizenship and those eligible for citizenship and provide no basis for a classification of citizens.

The Government has omitted to mention a previous example of group legislation against a class of citizens whose reasoning coincides with that of the Government's brief. See *Plessy* v. *Ferguson*, 163 U.S. 537. One comment of the dissenting justice seems to us worth noting here:

> "Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens in the United States, or of Protestants and Roman Catholics?" *Id.*, 163 U.S. at 558.

In any event, it is clear that even if less important rights could be taken away on the basis of classifications based on generalized conduct, the precious right of citizenship clearly cannot be taken away on such a basis.

In support of the group classification Congress has adopted, appellee stresses the important function of residence in the United States in order to assimilate the foreigner who comes to this country, citing sociological works. (Resp. Br. 60-64). Residence in this country is, of course, essential to assimilation. This is why Congress has made 5 years residence a prerequisite to naturalization and why residence has been a prequisite from the beginning. Act of March 26, 1790, 1 Stat. 103. Further, it is clear that if a naturalized citizen leaves the country within 5 years after naturalization, a presumption will arise that he obtained his citizenship fraudulently by stating under oath that he intended to reside in the United States. Section 340(d) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(d). Thus, in the usual case under Section 352, a naturalized citizen who takes his citizenship abroad will usually have resided in the United States for 10 years. During this time, he will, in most cases, have become thoroughly Americanized and will not readily re-acquire his former allegiance. Of course he may do so. However, whether such a citizen nevertheless does in fact abandon his allegiance and acquire a new allegiance is a question which as we have shown must be decided on an individual basis and not by imputing guilt on the basis of the actions and attitudes of others.[10]

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[10] As the Government notes (Resp. Br. 60-61) that, "ties formed in childhood are stronger than those acquired in later life." Thus, a naturalized citizen who, as appellant, lived in the United States from age 5 to age 20 and who has attended American schools and

IV. THE GOVERNMENT DOES NOT SHOW A RATIONAL NEXUS BETWEEN FOREIGN AFFAIRS POWER AND THE CHALLENGED LEGISLATION.

a. Legislative History

The essential emptiness of the Government's case seeking to justify the discriminatory provisions of Section 352 as a means to deal with international complications is indicated by its failure to rely on or even mention the cases which were presented to Congress as typical of the problems believed to require the challenged legislation.

The Cabinet Committee which recommended enactment of the challenged legislation presented to Congress 13 cases which it said were "illustrative of many presented to the State Department in recent years" and which are "typical and will be sufficient, it is believed, to show the general character of the problem. . . ." Nationality Laws of the United States (1938), part 1, House Committee Print, 76th Cong., 1 Sess. p. 72. The 13 cases appear id. at 72-75.

Not a single one of these "typical" cases presented to Congress involved complications with a foreign gov-

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colleges, will have been so thoroughly assimilated into American culture that he would appear to be no more likely to abandon his allegiance to the United States upon residing abroad than a native-born. This also has been recognized by Congress which in the exemptions to Section 352 has attached special significance to residence in the United States prior to attaining the age of 21. Sections 353(8) and 354(5). Nor is the case of a naturalized citizen who grew up in the United States an unusual one. Undoubtedly, there are large numbers of naturalized citizens who were brought to the United States at an early age, and who have, therefore, been completely assimilated into American culture and to whom any other country is necessarily foreign.

ernment. Most of the cases simply involved long residence abroad with no indication that such residence might cause diplomatic problems different from those raised generally by residence abroad of any citizen. In two of the cases the naturalized citizen had returned to the United States after long residence abroad. (!)[11] In one case the naturalized citizen resided "partly" in the United States but had a wife and ten children in Italy. None of the cases indicate any problem of any kind with the foreign government of the place of residence or former residence.[12]

Judge Fahy, in his dissenting opinion below, 218 F. Supp. 302, 318 n. 4 (R. 59) stated:

"It seems fairly clear from the discussion centering upon the 13 illustrative cases cited in sup-

[11] One of the purposes of the challenged legislation apparently was to prevent the return to this country of undesirable naturalized citizens. Mr. Flournoy, Assistant Legal Advisor, testified that the legislation was necessary because "the courts have held that you can not keep them out, no matter what you have against them. They may not be very loyal or may have a criminal record, or one thing or another, but if they are citizens they can come back into the United States." (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 136 (1940).

[12] In two of the cases the naturalized citizens left within less than five years of their naturalization and might also be deprived of their citizenship on grounds of fraud. In two other cases the naturalized citizen served for years in a foreign army and presented the question before this Court in *Marks* v. *Esperdy*, No. 253 this Term. Only one case out of the thirteen involved a request by a naturalized citizen residing abroad that the United States Government present a claim against a foreign government on his behalf. In that case, however, the Department of State refused to present the claim because it determined, under the standards of the 1907 Act, that citizenship had been abandoned. The decision was made prior to the statute and no representations were made to the foreign government.

> port of Section 352(a) when it came before Congress in 1938, that what was sought to be avoided was the necessity in each case to decide—either administratively or judicially—whether an individual had abandoned his American citizenship by continued residence in the land of his birth or prior nationality. These illustrative cases do not disclose what disputes arose, if any, between the Government of the United States and the foreign governments in connection with the various individual claims for passports, registration, or presentation of claims."

Since no actual or possible foreign affairs complications were involved in the only cases presented to the Congress to justify the legislation, it is not surprising that appellee ignores this aspect of the legislative history.

Instead, its brief avoids these more current matters and seeks to make much of the well-known Nineteenth Century problems involving the protection of American citizens which were sought to be subjected to military service by the countries of their former nationality, principally Prussia and Great Britain. Of course, there is not the slightest mention of these old conscription problems in the legislative history of the 1940 or 1952 Acts and no indication that this problem was still in existence or that the challenged legislation was designed to meet this problem.[18]

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[18] Appellee (Resp. Br. p. 22, n. 13) embellishes the history of the Nineteenth Century with a list of the military operations which the United States has undertaken to protect its citizens residing abroad "between 1831 and 1912." These incidents admittedly deal with "American citizens both native born and naturalized." There is no indication that such incidents were caused because of the residence abroad of naturalized citizens. Indeed, many of these incidents (those occurring in China, Japan and Korea) could not have involved naturalized citizens residing in their country of origin, because Orientals were ineligible for naturalization until 1952.

As indicated in our principal brief (p. 43), and conceded by appellee (Resp. Br. 11), this legislation can be sustained only if it was an appropriate means to deal with the problems with respect to which Congress has attempted to deal. *Perez* v. *Brownell*, 356 U.S. 44, 59. Congress, it is clear, however, did not enact this legislation to deal with the problems resulting from the international complications which might result from the residence abroad of naturalized citizens. The 13 "typical" cases, as well as the legislative history quoted extensively in both appellant's and the Government's brief show that the legislation was adopted by Congress to strip American citizenship for a completely different reason. See, *e.g.*, Br. 36-38, Gov. Br. 65-67.

The problem with which Congress attempted to deal was the naturalized citizen residing abroad who had abandoned his allegiance to this country. Congress adopted the automatic 3 and 5 year expatriation period to do away with inconvenience involved in a case-by-case determination of allegiance in such case. (Br. 7) There is no indication that any international complication actuated the adoption of this legislation.

Appellee insists (Resp. Br. 11, 50, n. 33, 70, 71; n. 40) that Section 352(a)(2) of the Act which provides for the expatriation of a naturalized citizen who resides for 5 years in any country other than the country of origin is of no relevance here.

We submit that for determining the congressional purpose in enacting the challenged legislation (Section 352(a)(1)) this companion provision is highly relevant. None of the possible foreign affairs problems which have been urged in support of Section 352(a)(1), such as the claims which a country of

origin might make on a person whom it still regards as its citizen, notwithstanding American naturalization, could support Section 352(a)(2). This confirms our view that both sections were enacted to deal with abandonment of allegiance, and not to resolve international complications.

b. Current Problems

Absent any evidence that Congress enacted this legislation to deal with any actual international complications resulting from the residence abroad of naturalized citizens, the government attempts to support the legislation on the basis of alleged complications which have resulted from the residence abroad of naturalized citizens *after* this legislation was adopted. Even assuming arguendo that the legislation could be sustained on such basis, it is clear that the Government has not done so.

The Government, in its brief, states that "the State Department advises us that protection of naturalized citizens is today a sensitive matter in a number of countries, particularly, Belgium, Greece, Iran, Israel, Switzerland and Turkey * * *" (Resp. Br. 45)

Such a general statement is of course meaningless in the present context.[14]

[14] It is certainly not the equivalent even of the statement from the Secretary of State that he would recommend this legislation today in order to deal with these problems raised in these countries, and that there was no reasonable way in which the particular problems in those countries could be dealt with without depriving American citizens of their citizenship in the many countries which clearly and fully recognize American naturalization.

Such a statement on the part of the Secretary of State seems quite unlikely particularly in the light of the insistence of President Johnson on the equal rights of all citizens. See, e.g. 1964 Congressional Quarterly Weekly Reports 478.

It is however followed by some specification of the problems contended to be relevant. These pertain to claims of obligations of military service by certain countries in which naturalized American *tourists* who traveled for a short period of time. (Resp. Br. 45-46) The Government suggests, without any supporting reasons, that more serious foreign policy problems would be likely to arise from longer stays in such countries. (Resp. Br., p. 46). In fact, the instances cited by the Government show that where a foreign country refuses to recognize American naturalization and desires to put a claim on its former citizen, it will do so immediately, and not wait for three years. This also seems to be supported by the thirteen "typical" cases cited by the Cabinet Committee where long-term residence abroad was not associated with problems of protection. Thus the recent incidents of the problems of tourists certainly do not support the present legislation. Even if we accept the premise that if a citizen causes any complication, the Government has the right to cut off his citizenship, the only legislation the cited incidents would support is denaturalization of all naturalized citizens who travel abroad even for the shortest periods.

The labored reference to current troubles of tourists seems only to confirm appellant's position that Congress provided the expatriation of naturalized citizens residing abroad for the three or five year period, not because of the international complications likely to arise as a result of such long residence, but rather in order to deal with abandonment of allegiance by naturalized citizens on a group rather than on an individual basis. As shown in our principal brief, pp. 31-34, the legislation can not be sustained on such a basis.

c. Foreign Statutes

Furthermore, appellee, in support of the reasonableness of this legislation refers to the laws of other countries. An examination of these laws shows that, contrary to appellee's assertion, legislation similar to Section 352 is rare indeed.[15]

In summary, Section 352 clearly was not enacted by Congress as a measure to deal with international complications. Nor is it supported by an evidence of an entirely different type of subsequent international complications not presented to Congress when it enacted this legislation in 1940.

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[15] There appear to be only 9 countries which provide for the expatriation of naturalized citizens on the basis of residence abroad alone. These countries are the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Paraguay, Thailand, and Venezuela. (Resp. Br. 47). (New Zealand also listed in the category by appellee recently repealed such a law and has no provision at all for loss of citizenship because of residence abroad, "Involuntary Loss of Citizenship by Naturalized Citizens Residing Abroad," *supra*, 49 Cornell L.Q. at 77, n. 197.) The countries with such laws have completely different legal systems from ours and do not have large immigrant populations.

Great Britian and Australia, for example, expatriate naturalized citizens residing abroad *only* if they fail to file annual declarations of intent to remain citizens. (Resp. Br. 48). The proposed United Nations Convention on the Reduction of Statelessness adopted a similar standard. (Resp. Br. 49). Such provisions are not even remotely comparable to the automatic expatriation of naturalized citizens residing abroad regardless of their allegiance and of their intent to remain citizens.

"Large immigrant countries of the Western Hemisphere including Argentina, Bolivia, Colombia, Chile and Uruguay, which are more akin to the practical necessities and historic background of the United States, do not have provisions for loss by residence abroad at all." "Involuntary Loss of Citizenship by Naturalized Citizens Residing Abroad," *supra*, 77-78, n. 197.

Moreover, since the legislation was not an attempt to deal with any actual problems of international complications involved in the residence abroad of naturalized citizens, it cannot be said that Congress, if any such problems had been presented to it, would not have adopted much more limited measures, if any at all, to deal with them.

In any event, as Judge Fahy pointed out in his dissenting opinion below, to permit this discriminatory legislation on such uncertain and unsubstantial speculation as to possible difficulties would "create such a serious inequality among Americans upon so tenuous a basis that it fails the test of reasonableness which substantive due process requires of all legislation, especially that which restricts the liberty of the citizen." (R. 59), 218 F. Supp. at 322.

V. SECTION 352 IS NOT CONSTITUTIONAL AS APPLIED TO APPELLANT.

Appellee contends that even if Section 352 were unconstitutional as applied to others, it is constitutional as applied to appellant. (Resp. Br. 82-89)

It is the Government's position that because appellant is living with her husband, who practices his profession in Germany, and intends to do so for the foreseeable future, the statute is not unconstitutional as applied to her. The Government asserts that "In effect, appellant is seeking the benefits of citizenship while remaining a foreigner." (Resp. Br. 85)

The fact is, however, that appellant is no more a foreigner than any other American woman residing abroad with her husband. The only thing that differentiates her from other American women living abroad with their husbands is her foreign birth.

The Government asserts that a person who resides abroad with no immediate intention to return is "most likely to renew full attachment to the counry of residence." (Resp. Br. 84) While an intent not to return may in certain cases be indicative of a lack of allegiance, it clearly is not so here. The only reason for appellant's residence abroad is to be with her husband, a purpose totally consistent with continued allegiance to this country, a conclusion implicit in the decision of the Congress not to seek to remove the citizenship of women in identical situations who were born here.

On the contrary, as the appellee concedes elsewhere (Resp. Br. 60-61), the fact that appellant was educated in this country puts her into the category of citizens least likely to abandon allegiance to this country.

The Government further urges that the impact of expatriation upon the individual is "much less onerous when the naturalized citizen has no desire to return to the United States." (Resp. Br. 85) The Appellee concedes, however, that the expatriate loses "the right to return if adversity or some other unforeseen circumstances makes this desirable sometime in the future." (Resp. Br. 85) The residence abroad of an American woman with her foreign husband is usually premised up such uncertain factors as the continued life of the husband and on the political situation in the country of residence. The fact that there is no present intention to return to the United States does not make any less valuable the right to return to the United States at a future date. On the contrary, the assurance that a woman married to a foreigner has the right to return home is vital. The Constitution does not

permit an American woman, native-born or naturalized, to be abandoned by her country in time of personal disaster or political upheaval.

Appellee, in its attempt to minimize the effects of expatriation, has suggested that appellant could obtain German naturalization easily if she so desired. (Resp. Br. 7) This is no doubt the case. It is undoubtedly true that Mrs. Schneider and the many American women—born or naturalized—residing with their husbands abroad could readily, under the laws of the countries of residence, adopt the nationality of those countries if they so desired.

The record shows, however, that Mrs. Schneider, like many American women born or naturalized in the same situation, does not so desire; that she regards the United States as her country; and that she wishes to keep her United States citizenship. She has indeed deliberately chosen to suffer the damage and disadvantages of statelessness rather than to accept German or any other citizenship. (R. 9)

Appellee in its statement of facts, (Resp. Br. 7), however, mis-states the record in an attempt to suggest that Mrs. Schneider still retains the German citizenship which she acquired at birth.[16] This suggestion flies in the face of the record.

The complaint in paragraph 15(R. 4) states that under German law, plaintiff "was and is a stateless person." The affidavit of plaintiff in support of her motion for summary judgment sets forth her stateless status in circumstantial detail as quoted in the note

[16] Equally without basis, see infra, it questions whether she has made any claim to German citizenship, or whether she has contested her classification as a stateless person.

below.[17] No counter-affidavit was filed. The court below found "The plaintiff is now stateless" (R. 35) The record is clear and conclusive. It cannot be set aside by counsel's conjecture that the German law might differ from the construction given it by the competent German authorities.[18]

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[17] The uncontradicted affidavit states:

"7. I have been able to acquire from the local authorities in Germany an identification paper as a stateless person . . ."

"The action in question places me in a position where I have no nationality." (R. 8).

"I have no political loyalty or allegiance either to Germany or any other country except the United States." (R. 9).

• • • •

"When I lost my United States passport by the refusal of the American Counsul to extend it, the local police asserted that German law required my expulsion and it was only after much discussion and difficulty that I was granted permission to stay for an interim period. . . ." (R. 11).

• • •

[18] In the face of the clear position of both Mrs. Schneider and the German authorities that Mrs. Schneider does not have German citizenship, counsel have exercised their ingenuity in construing Germany's Nationality Act of 22nd July, 1913, so as to suggest that Mrs. Schneider may not have lost her German citizenship and may now be a German citizen. (Resp. Br. 7, n. 5.)

They refer to Sections 19 and 25 of the German Nationality Act United Nations Legislative Series, *Laws Concerning Nationality* (1954). They read Section 25 to provide that a person having a legal representative loses German citizenship only if he is in a position to apply for release of citizenship to a German court and suggest that there is no evidence that this procedure was followed. Counsel, however, omit to note that the provision for release of citizenship cited by them specifically states that the consent of the specified court is *not* necessary if the application is made by a mother responsible for the custody of the child who is also surrendering her own German citizenship. Section 19, para 2. Accordingly, no application to a German court was necessary in

VI. RESIDENCE IN COUNTRY OF ORIGIN IS CLEARLY CONSISTENT WITH ALLEGIANCE AND CAN BE NO BASIS FOR EXPATRIATION UNDER THE DECISIONS OF THIS COURT

As shown on pp. 58-61 of our principal brief, this Court has never held that Congress may attach expatriation to an act such as residence abroad, which is completely consistent to American citizenship.

In *Mackenzie* v. *Hare*, 239 U.S. 299 and *Savorgnan* v. *United States*, 338 U.S. 491, the Court upheld the constitutionality of statutes which attached expatriation to acts through which the citizenship of a foreign country was acquired.

In *Perez* v. *Brownell*, 356 U.S. 44, the majority of this Court upheld the constitutionality of the expatriating statute because it felt that voting in a foreign political election could rationally be deemed to connote both lack of allegiance to the United States and allegiance to a foreign country.

Indeed, this Court's decision in *Perez*, as well as both the concurring opinion of Mr. Justice Brennan and the dissenting opinion of Mr. Justice Stewart in

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order for the naturalization of Mrs. Schneider through her mother automatically to terminate her German citizenship.

There are many other reasons why the German authorities are right that Mrs. Schneider is not a German citizen which need not be gone into now. We cite only one more. Professor Schaetzel of Bonn University, in his leading commentary on the German Nationality Act. "*Das Deutsche Staatsangehoerigkeitsrecht*" (2nd Ed. 1958), page 201, states specifically that a release from German citizenship remains valid even though the parties have neglected the procedure of obtaining the court approval mentioned under Section 19, and cites for this proposition two other leading German authorities: Lichter, p. 124; Keller-Trautmann, p. 250.

Kennedy v. *Mendoza-Martinez, supra,* 372 U.S. at 187-188, 241, clearly suggest that the congressional power to expatriate is limited to conduct which may be deemed in derogation of undivided allegiance to this country. (See Br. 59-61.)

Appellee, to bring the challenged legislation within these limits, contends that voting in a foreign election, the expatriating act in *Perez,* "is more consistent with allegiance to the United States than prolonged residence in one's own native country * * *." (Resp. Br. 12)

We submit that this is clearly not the case. Voting in a foreign election involves, of course, participation in the political affairs of a foreign country. It was on this ground that the majority in *Perez* held that Congress had the power to say that this act was proof of political allegiance to that country rather than the United States.

On the contrary, residence in a foreign country in itself represents in no way a participation in its political affairs, nor in any other way carries with it an allegiance to the country of residence. This Congress has recognized in placing no restriction on the residence abroad of native-born citizens.

The fact that the country of residence is the country of former nationality does not change the nature of the act. The residence there of a naturalized citizen in his former country, as a residence of any citizen abroad may be, as here, for personal or business reasons and is not, of course "of significance politically." *Perez, supra,* 356 U.S. at 62. It serves as no basis for a claim that political allegiance to the country of residence is involved.

VII. SECTION 352 IS PENAL

Appellee contends that Section 352 is not penal because "since residence abroad is not morally reprehensible it is inherently unlikely that Congress would seek to punish it." (Resp. Br. 89.)

On the other hand, appellee seeks to sustain this legislation as a measure to deal with "serious compromises of allegiance." (Resp. Br. 59, 67.)

The Government cannot have it both ways. If this is a measure to deal with serious compromises of allegiance, and we submit that it is, the conduct involved is clearly reprehensible. The statute involves conviction of disloyalty without trial and perpetual banishment as punishment.

Appellee insists there is no basis in the legislative history for considering the challenged legislation as penal. The legislative history, however, clearly reflects the intention of Congress to apply expatriation as a sanction because it regarded it disloyal conduct for naturalized citizens to reside abroad. See materials quoted, Br. 36-37.

The punitive nature of the legislation is further reflected by the fact that it was expressly designed to apply, unlike the 1907 Act, to naturalized citizens who returned to the United States after the three or five year periods of residence abroad provided for in the statute have run. See page 16, *supra*. None of the reasons urged in support of the statute would apply to such a person. The only basis for denying to such a person the right to return home to this country as a citizen is to punish him.

The punishment without trial is clearly invalid under the Fifth and Sixth Amendment and cruel and unusual punishment under the Eighth Amendment.

CONCLUSION

Appellant is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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